SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1902.

No. 231.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE DENVER AND RIO GRANDE RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

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1 UNITED STATES OF AMERICA, ss.

The President of the United States, to the honorable judges of the supreme court of the Territory of New Mexico, greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, wherein the United States of America was plaintiff in error and the Denver & Rio Grande Railroad Company was defendant in error, a manifest error hath happened, to the great damage of said The United States of America, plaintiff in error, as by his complaint appears.

We, being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in Washington within sixty days from the date hereof, in the said Supreme Court, to be then and there held; that the record and proceedings aforesaid, the said Supreme Court may cause further to be done therein to correct that error, what of right and according to the laws and custom of the United States should be done.

Witness, the honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 14th day of January, A. D. 1902.

[SEAL.] JOSÉ D. SENA,
Clerk of the Supreme Court of the Territory of New Mexico.

2 I, the undersigned, the clerk of the supreme court of the Territory of New Mexico, do hereby make return to the within writ of error, by transmitting to the Supreme Court of the United States a true copy of the record and proceedings in the cause therein mentioned, under my hand and the seal of the supreme court of the Territory of New Mexico.

[SEAL.] JOSÉ D. SENA,
Clerk Supreme Court of the Territory of New Mexico.

Be it remembered, that heretofore, on the 27th day of October, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a precipe for a writ of error, which said precipe for writ of error is in words and figures as follows, to wit:

"OCTOBER 27TH, 1900.

"Hon. JOSÉ D. SENA,
"*Clerk Supreme Court, Santa Fe, N. M.*

"DEAR SIR: Will you issue a writ of error to the district court of the first judicial district requiring the clerk of that court to send up the transcript of record in the case No. 842, wherein the United States of America is plaintiff and the Denver and Rio Grande Railroad Company is defendant.

"You will please file this letter as your precipe for the writ.

"Truly, yours,
(Signed) "A. A. JONES,
"*Special Asst. U. S. Atty.*"

3 And afterwards, on, to wit, the 22nd day of November, A. D. 1900, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a precipe for citation, which said precipe for citation is in words and figures as follows, to wit:

"NOVEMBER 20TH, 1900.

"JOSÉ D. SENA,
"*Clerk Supreme Court.*

"DEAR SIR: Please issue citation in cause No. 842, The United States vs. Denver & Rio Grande R. R. Co.

"Very truly, yours, "A. A. JONES,
"*Asst. U. S. Atty.*"

And afterwards, on, to wit, the first day of December, A. D. 1900, there filed in the office of the clerk of the supreme court of the Territory of New Mexico a transcript of record, which said transcript of record is in words and figures as follows, to wit:

4 Be it remembered that on the 29th day of October, 1900, there was filed in the office of the clerk of the first judicial district of the Territory of New Mexico, a præcipe, which said præcipe is in the words and figures as follows, to wit:

Hon. A. M. BERGERE,
Clerk District Court, Santa Fe, New Mexico.

DEAR SIR: Will you please prepare a transcript of record in case No. 842, The United States vs. The D. & R. G. R. R. Co. The transcript should include:

1. The declaration.
2. The bill of particulars filed by the plaintiff.
3. The plea of the defendants.
4. The joinder of issue by plaintiff.
5. Your record entries of empaneling of the jury on the trial case, including the verdict. Also the order of the court overruling motion for a new trial.
6. The final judgment in the case.
7. The bill of exceptions.
8. The clerk's certificate.

Please file this letter as your præcipe.

Very truly, yours, A. A. JONES,
Special Assistant United States Attorney.

TERRITORY OF NEW MEXICO,
First Judicial District:

Pleas before the Hon. John R. McFie, associate justice of the supreme court of the Territory of New Mexico, and judge of the first judicial district court thereof.

5 Be it remembered, that heretofore, to wit: On the eleventh day of April, in the year eighteen hundred and ninety-six, there was filed in the office of the clerk of the district court of the first judicial district of the Territory of New Mexico, a declaration, which said declaration is in the words and figures as following, to wit:

TERRITORY OF NEW MEXICO,
First Judicial District:

In the district court for the first judicial district of the Territory of New Mexico, sitting for the trial of causes arising under the Constitution and laws of the United States.

To the Hon. Napoleon B. Laughlin, associate justice of the supreme court of the Territory of New Mexico, and judge of the first judicial district thereof:

The United States of America, by J. B. H. Hemingway, United States attorney for the Territory of New Mexico, sues the Denver and Rio Grande Railroad Company, a corporation duly organized according to law and doing business in the said first judicial district. For that defendant converted to its own use plaintiff's goods; that is to say, logs, lumber, and timbers, the said logs, lumber, and timbers manufactured out of trees theretofore standing and growing upon certain lands of the plaintiff, situate in the district aforesaid, described as follows, to wit:

Sections one (1), two (2), three (3), seven (7), eight (8), nine (9), ten (10), eleven (11), twelve (12), fourteen (14), fifteen (15), sixteen (16), seventeen (17), and eighteen (18), township thirty-one (31) N., R. 1 W., and sections twenty-five (25), twenty-six (26), twenty-seven (27), twenty-eight (28), twenty-nine (29), thirty (30), and thirty-six (36), township thirty-two (32) N., R. I W.

6 And the plaintiff claims ninety-six thousand dollars, together with interest and costs of this suit.

J. B. H. HEMINGWAY,
United States District Attorney, Santa Fe, N. M.
A. A. JONES,
Special Assistant United States Attorney,
Attorneys for Plaintiff.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES
vs.
DENVER & RIO GRANDE RAILROAD COMPANY.

Declaration.

J. B. H. HEMINGWAY,
U. S. Dist. Atty.
A. A. JONES,
Asst. U. S. Atty.

Filed in my office this April 11th, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the same day, to wit, the seventh day of May, 1896, there was filed in the office of the clerk of said district court

the bill of particulars of plaintiff's demand, which said bill of particulars is in the words and figures as follows, to wit:

District court, first judicial district, Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 642. Trover.

7 *Bill of particulars of plaintiff's demand.*

For the conversion by the defendant of 30,000 logs each of the value of $1.00	$30,000
For the conversion by the defendant of 5,500,000 feet board measure, of lumber and dimension timbers of the value of $12 per 1,000 feet	66,000
Total	96,000

All of said logs, lumber, and dimension timbers having been manufactured out of trees cut and felled upon the lands described in the declaration in this cause, and converted by the defendant on divers days and times between the first day of January, A. D. 1892, and the commencement of this suit.

J. B. H. HEMINGWAY,
U. S. District Attorney for New Mexico.
A. A. JONES,
Special Assistant U. S. Attorney.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } Trover. Bill of particulars.

Filed in my office this May 7th, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the eighteenth day of May, A. D. 1896, there was filed in the office of the clerk of said district court the plea of defendant, which said plea of defendant is in words and figures as following, to wit:

8 TERRITORY OF NEW MEXICO,
First Judicial District.

In the district court for the first judicial district.

THE UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 842. Trover.

The said defendant, by Edward L. Bartlett and Wolcott & Vaile, its attorneys, says, as and for its plea to the plaintiff's declaration herein, that it is not guilty of the wrongs alleged.

EDWARD L. BARTLETT,
WOLCOTT & VAILE,
Attorneys for Defendants.

[Endorsements.]

No. 842.

In the district court, first judicial district.

THE UNITED STATES OF AMERICA
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } Plea of defendant.

Filed in my office this May 18, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the twenty-fifth day of May, 1896, there was filed in the office of the clerk of the district court a replication, which said replication is in the words and figures as following, to wit:

District court, first judicial district Territory of New Mexico.

UNITED STATES OF AMERICA
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } No. 842. Trover.

9 Now comes the plaintiff in the above-entitled cause and joins issue upon the defendant's plea filed in said cause.

GEO. P. MONEY,
United States Attorney for New Mexico.
A. A. JONES,
Special Assistant to the United States Attorney for New Mexico.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES OF AMERICA
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } Trover.

Filed in my office this May 25, 1896.

GEO. L. WYLLYS, *Clerk.*

And afterwards, to wit: On the thirteenth day of September, 1900, the same being the tenth day of the regular session of the district court held at Santa Fe, New Mexico, within the first judicial district of the Territory of New Mexico, the following proceedings were had and entered of record, to wit:

UNITED STATES OF AMERICA
vs.
DENVER & RIO GRANDE RAILROAD COMPANY. } No. 842, Trover.

Now comes the plaintiff, The United States of America, by her special counsel, A. A. Jones, esq., and now comes the defendant, by its attorneys, Messrs. Wolcott, Vaile and Bartlett, and issue having been joined between said parties, and stipulations having been filed by the said parties as to the testimony in the case, thereupon comes the jury, to wit:

Vivian Griego, Valentine Pacheco, Candido Duran, Albino Ortega, J. T. Sandoval, Frank Romero, Alberto Garcia, Ramon Romero, Preciliano Garcia, Francisco Ortiz, Cruz Martinez, Trinidad Vigil, twelve good and lawful men taken from the body of the first judicial district of the Territory of New Mexico, who having duly elected, empaneled, and sworn, the truth to speak upon the issues between the said parties, hear the evidence (according to the stipulation entered into by the said parties), and the instructions of the court, and under the instructions of the court, and the evidence, return into open court the following verdict, to wit:

"We, the jury, empaneled in the above-entitled cause to try the issues joined between the parties, do find the defendant not guilty. Francisco Romero, foreman."

And thereupon the plaintiff gives notice of a motion for a new trial.

And at a session of the first judicial district court of the Territory of New Mexico, held in the city of Santa Fe, county and Territory aforesaid, on the said thirteenth day of September, A. D. 1900, the same being the tenth day of said term, the following proceedings were had and entered of record, to wit:

UNITED STATES OF AMERICA
vs.
DENVER AND RIO GRANDE RAILROAD COMPANY. } No. 842, Trover.

Again comes the plaintiff by her special counsel, A. A. Jones, esq., and again comes the defendant by its counsel, Messrs. Wolcott, Vaile

and Bartlett, and the motion for a new trial having been presented by the plaintiff in open court, and the same having been considered by the court, is hereby overruled in an order in the following words, to wit:

11 In the district court of the first judicial district of the Territory of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, DEFENDANT. } No. 842.

ORDER.

Now comes the parties in the above-entitled cause by their respective attorneys, and the plaintiff now moves the court for a new trial for the reasons set forth in its motion on file in said cause, the court having duly considered said motion and the matters and things therein contained, it is considered and adjudged by the court that said motion be, and the same hereby is, overruled.

To which action of the court in so overruling said motion, the said plaintiff does now except.

JOHN R. M'FIE,
Associate Justice of the Supreme Court of New Mexico, and Judge of the First Judicial District Court thereof.

It is therefore ordered, considered, and adjudged by the court that the defendant, The Denver and Rio Grande Railroad Company, as to said charge go hence without day, and it hereby is discharged.

And afterwards, to wit: On the tenth day of November, A. D. 1900, there was filed in the office of the clerk of said district court a bill of exceptions, which said bill of exceptions is in the words and figures as following, to wit:

Territory of New Mexico, in the district court, first judicial district.

12 UNITED STATES OF AMERICA, PLAINTIFF,
vs.
DENVER AND RIO GRANDE RAILROAD COMPANY, DEFENDANT. } No. 842.

Be it remembered that on the tenth day of November, A. D. 1900, there was filed in said cause the following

BILL OF EXCEPTIONS.

Be it remembered, that on the trial of the above-entitled cause, had on the 14th day of September, 1900, the following among other proceedings were had:

TRIAL.

A. A. Jones, esq., and William B. Childers, esq., United States attorneys for the Territory of New Mexico, representing the plaintiff; and Gen. E. L. Bartlett and Wolcott & Vaile, representing the defendants.

Case of the plaintiff.

Mr. JONES. The facts which the plaintiff offers in evidence have been agreed upon and are contained in this stipulation, which is filed in the case. These facts, gentlemen of the jury, I will read to you, as counsel upon the other side has, under the stipulations, the right to make any objections to the competency, relevancy, or materiality of any of these facts.

It is agreed, first: Prior to the beginning of this suit the New Mexico Lumber Company, a corporation, was engaged in the general logging and lumbering business, and had a sawmill at Lumberton, on the Denver and Rio Grande Railroad, the same being or in the immediate vicinity of the lands described in the plaintiff's declaration.

Second: Prior to the beginning of this suit, the said The New Mexico Lumber Company did cut from the lands described in the declara-
13 tion 2,100,000 feet of lumber, and the same to that amount was furnished to and received by the defendant railroad company for its use.

Third. That at the time of said cutting the said lands were public lands of the United States, situated in Rio Arriba County, New Mexico.

Fourth. That the stumpage value of the said timber so cut and delivered to the defendant railroad company was then $2.00 per thousand feet, and the value of said lumber in the manufactured state as delivered was $9.00 per thousand feet.

Fifth. The said New Mexico Lumber Company delivered the said 2,100,000 feet of lumber to the defendant railroad company during the period of time extending from January 1, 1894, to August 1, 1895——

Mr. VAILE. From there on, in the paragraph number 5, the defendants object to the introduction of the residue of that paragraph for the reason that the statements of fact therein contained are incompetent, immaterial, and irrelevant as to the issues on trial in this case, the same relating only to the New Mexico Lumber Company, which is not a party, and in no way affecting the rights or interests in controversy between the Government and the defendant railroad company.

Mr. JONES. The plaintiff considers the remaining facts material for this reason: If the New Mexico Lumber Company, which delivered the lumber to the defendant in this case, was a willful trespasser upon the public domain, that would affect the measure of damages in this case.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the defendant, by its counsel, then and there excepted.

14 Mr. JONES. I will complete the reading of the paragraph:

——and during such period of time said lumber company, without authority from the defendant railroad company, also cut from the lands described in the declaration 5,400,000 feet of lumber in addition to that delivered to the defendant company; that during said period of time said lumber company did not cut from private lands exceeding 100,000 feet; that the timber taken by the said lumber company from the lands described in the declaration was taken as reached upon the said lands, without reference to size or dimensions, and all available sawmill timber was taken by the said company from the said lands, and the logs piled upon the sawmill yard without reference to whether they would be

used in filling orders from the defendant railroad company or not; that the agents of said lumber company, at the time of the cutting of the said timber by it, knew that the said lands were the public lands of the United States, and that the said 5,400,000 feet of lumber was sold by the said lumber company upon the general market, in the State of Colorado. Suit has heretofore been brought by the United States against the New Mexico Lumber Company for said 5,400,000 feet of lumber, and final settlement has been made of the suit so brought. The plaintiff does not seek in the present action to recover from the defendant railroad company anything for the taking by the said lumber company from lands of the 5,400,000 feet above referred to. But no suit is pending against the New Mexico Lumber Company for the above-mentioned 2,100,000 feet, nor has the plaintiff had any recovery or judgment for the same.

Mr. JONES. That, if the court please, and gentlemen of the jury, is the case which the plaintiff submits to you.

15 *Defendant's case.*

Mr. VAILE. May it please the court, and gentlemen of the jury, on the side of the defendant certain facts have been agreed to, expressed in an agreed statement of facts, which will be filed. I will read those facts which are material for you to hear.

First. It is agreed that the defendant, the Denver and Rio Grande Railroad Company——

Mr. JONES. Now, if the court please, I desire to object to the introduction in evidence of the first paragraph of facts, for two reasons: First, the act of Congress which is sought to be thus introduced in evidence is null and void for uncertainty. It purports to grant to the railroad company the right to take timber from the public lands of the United States, from lands adjacent to the right of way. That is the only designation or description of the lands from which timber may be taken, and the term "adjacent" is indefinite, uncertain, and therefore the lands from which timber may be taken are not sufficiently described so as to render the act a valid act and confer any valid or certain rights upon the defendant railroad company. Second, because there has been no foundation laid in this case for the introduction of this special act of Congress in the pleadings. We contend that it is the duty of the defendant to plead this act and prove it, and therefore the statement contained in that paragraph is incompetent, irrelevant, and immaterial.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the plaintiff, by its counsel, then and there excepted.

Mr. VAILE. I will commence reading this paragraph once more: It is agreed that the defendant, the Denver and Rio Grande Railroad Company,

16 is the successor to the Denver and Rio Grande Railway Company, and is and at all times herein mentioned has been entitled to all the right and benefits lawfully conferred upon the said the Denver and Rio Grande Railway Company——

Mr. JONES. I want it understood that my objection applies to both of the acts of Congress mentioned in the first paragraph.

Mr. VAILE (continuing). ——by act of Congress approved June 8, 1872, entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," the same being found in 17 U. S. Statutes, at page 339, to which reference is hereby made, and which said statute is made a part of the agreed statement, and copy thereof is hereto attached and marked "Exhibit A;" and that said defendant railroad company is also entitled to all rights and benefits arising from the act of Congress approved March 1, 1877, amendatory of said right-of-way act, said amendatory act being found in volume 19 of U. S. Statutes, at page 405, to which reference is hereby made, and said statute is made a part of this agreed statement of facts, and copy thereof is hereto attached and marked "Exhibit B."

Second. ——

Mr. JONES. Now, as to the second paragraph of the statement of facts offered by defendant, I desire to object for the following reasons: First, as to the statement that certain portions of the defendant's railroad, 1,130 miles, was constructed under the act of June 8, 1872, and March 1, 1877, that it is irrelevant and immaterial, because the acts referred to are null and void for the reason stated in the objection heretofore made, and therefore conferred no rights upon the defendant company; and secondly, because the said acts are not properly in evidence in this case, and the reference
17 in that statement to the road which was constructed under the act of 1875 is irrelevant and immaterial, because it does not tend to prove any of the issues in the case.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Second. That on the 8th day of June, 1882, the Denver and Rio Grande Railway Company, acting under and in accordance with the statutes of June 8th, 1872, and March 1st, 1877, herein above cited, had constructed 1,130 miles of its railway lines, and subsequent to the said 8th day of June, 1882, the said railway company and its successor in interest, the defendant, The Denver and Rio Grande Railroad Company, proceeding under the act of Congress of March 3rd, 1875 (18 U. S. Statutes, page 482), constructed 536 miles of railway in addition to said 1,130 miles heretofore constructed, no portion of which new construction was in the vicinity of the said lands described in the plaintiff's declaration.

Third. That the railroad lines so constructed prior to June 8th, 1882, extended through a portion of the land described in plaintiff's declaration in this cause, and for a distance of 100 miles west and 400 miles east and north from said lands.

Fourth. ——

Mr. JONES. As to the fourth paragraph of the statement of facts, I desire to object, not to that portion which states that the defendant appointed the New Mexico Lumber Company as its agent—the fact that the appointment I have no objection to—but as to the instrument in writing which is the appointment, I object to its introduction in evidence in this case, for the reason that it contains declarations in the interest of the defendant company; that the declaration therein contained
18 cannot bind the plaintiff in this case, and unless it is attempted to be shown by the railroad company, the defendant, that this

timber was taken for the purposes mentioned in the act of Congress, these recitals in the appointment of the lumber company, as agent of the railroad company, are irrelevant and immaterial; and the paper—the exhibit which is made a part of that statement of fact—contains recitals which would make the taking of the lumber for a lawful purpose apparently, if the act of Congress is properly in evidence and the defendant has the benefit of it. We do not think that the Government should be bound by any statement in that paper which appointed or constituted the lumber company the agent of the defendant railroad company, and so far as the general facts in this case are concerned, and all that the defendant offers to prove, it makes no difference whether the New Mexico Lumber Company was the agent of the railroad company or not, in the view which we take of this case, and on that theory we believe that the whole of the paragraph is objectionable as being incompetent, irrelevant, and immaterial.

The COURT. The objection will be overruled.

To which action of the court in overruling the said objection the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Fourth. That before the cutting of any of the 2,100,000 feet of lumber in the plaintiff's statement mentioned, the defendant railroad company appointed the said The New Mexico Lumber Company as its agent, to procure for it timber from the public lands of the United States. The appointment so made was in writing and a copy thereof and of the acceptance of the same is hereto attached and made a part hereof and marked "Exhibit C."

Fifth. ——

19 Mr. JONES. We object to the statement contained in the fifth paragraph of this statement of facts on the grounds that they are irrelevant and immaterial, and as a more specific objection, it is immaterial in this case whether the lumber was furnished to the railroad company upon written orders or not. The fact that it was furnished is only material in this case, and it is sought by this testimony and the form of order attached, to in some manner vindicate the defendant company, and these orders are mere declarations in interest, and are not competent or material evidence in this case. If introduced in evidence they could have no legitimate purpose or constitute any proper evidence to prove any of the issues in this case on behalf of the defendant or otherwise.

The COURT. The objection will be overruled.

To which action of the court, in overruling the said objection, the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Fifth. That all of said 2,100,000 feet of lumber delivered to the defendant railroad company as aforesaid was furnished upon specific orders in writing given by the defendant railroad company to said The New Mexico Lumber Company as its agent, said orders being in the general form, copy of which is hereto attached and made part hereof and marked "Exhibit D."

Sixth. ——

Mr. JONES. Now, if the court please, we object to the facts contained in paragraph six, because they are incompetent, irrelevant and immaterial, and because the act of Congress of June 8th, 1872, is not properly

in evidence in this case, and confers no right upon the defendant company to cut any timber from the public lands. It is immaterial as to the distance this timber may have been from the railroad. I will also interpose the general objection that the facts in said para-
20 graph are incompetent, irrelevant and immaterial for any purpose or for proving any of the issues in this case.

The COURT. The objection will be overruled.

To which action of the court, in overruling the said objection, the plaintiff, by its counsel, then and there excepted.

Mr. VAILE (continuing). Sixth. That all of said 2,100,000 feet of lumber so received by the defendant railroad company was cut from trees standing within a maximum distance of three miles from the main line of the defendant railroad company; that about one-third of the whole amount was cut within one mile of the said railroad line, one-third at a distance of more than one mile but not exceeding two miles, and the remaining one-third at a distance of more than two miles but not exceeding three miles from the said railroad line.

Mr. VAILE. We now offer in evidence Exhibit A, which is the statute of the United States approved June 8th, 1872, and found in 17 Stat. at Large, page 339. We also offer in evidence——

Mr. JONES. Well, if the court please, I assumed that they were already in evidence; that they were offered in connection with the paragraph which refers to them. I made the objection at that time upon that theory. I prefer that they be not put in separately as offered now, but they are in evidence as exhibits to the paragraphs.

Mr. VAILE. We prefer to have them offered separately. There is no objection to the stenographer repeating the objections in the record. All we want is a distinct offer of the statutes and the orders.

Mr. JONES. Then it will be understood that the objections I
21 made as counsel was reading the agreed statement of facts, as to these respective exhibits shall be considered as renewed at this time.

Mr. VAILE. Yes, sir.

Mr. JONES. Well, the record can show then, that the objections made at the time the statement of facts was read, and reference made to the exhibits, shall be considered as specifically made at this time to the introduction of the acts, and the appointment and acceptance, and form of orders.

The COURT. The record may show that. Also the rulings of the court upon the objections, and the exceptions taken, without repeating them again.

Mr. VAILE. We will offer Exhibit A.

"Exhibit A, from 17 U. S. Statutes at Large, page 339.

"Chapter CCCLIV. An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and side tracks, not exceeding twenty

acres at any station, and *and* not more than one station in every ten miles, and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby, granted and confirmed unto the Denver & Rio Grande Railroad Company, a corporation created under the incorporat'on laws of the Territory of Colorado, it successors and assigns; and all the rights, powers,
22 and franchises conferred by the said laws and corporations created under them for constructing and operating railroad and telegraph lines, are hereby ratified and confirmed to the above-named railway company, its successors and assigns; and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines are hereby granted to the said company, its successors and assigns, for the extension and operation of its railway and telegraph line in and through any contiguous territory of the United States to the northern boundary line of Mexico, subject to the compliance with the conditions and requirements of the general incorporation laws of said territory, so far as the same are applicable and not inconsistent with the laws of the United States; and the same rights, powers, and privileges conferred upon the Union Pacific Railroad Company by section three of an act approved July second, eighteen hundred and sixty-four, are hereby conferred upon the above-named company, its successors and assigns:

"Provided, That applications for the assessment of damages shall be made to the court, or any judge of a court having jurisdiction in the county in which the lands or premises lie:

"Provided, That the said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe, within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year hereafter, and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road:

"And provided further, That nothing in this act contained
23 shall be construed as affirming or denying the right of any Territory to incorporate a railroad company.

"Approved June 8th, 1872."

Mr. VAILE. We offer in evidence the act of Congress approved March 1st, 1877, found in 19 Stat. at Large, page 405, marked Exhibit B.

"EXHIBIT B.

"Also the following act, amendatory of the foregoing and found in 19 U. S. Statutes at Large, at page 405, to wit:

"Chapter CXXVI. An act to amend an act entitled: 'An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company,' approved June eighth, eighteen hundred and seventy-two.

"Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,

"That an act entitled: 'An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company,' approved June eighth, eighteen hundred and seventy-two, be, and the same is

hereby, amended by making the second proviso in said act to read as follows, to wit:

"Provided, That said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter; and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road.

"Approved March 1st, 1877."

Mr. VAILE. We also offer in evidence Exhibit C, being the appointment of the New Mexico Lumber Company as the agent of the Denver & Rio Grande Railroad Company, to take the timber from the
24 public lands, and the acceptance thereof, which is as follows:

"EXHIBIT C.

"Whereas, by certain acts of Congress of the United States, the Denver & Rio Grande Railroad Company, in its own right, and as successor of the Denver & Rio Grande Railway Company, is authorized to take from the public lands adjacent to its line of railway, stone, timber, earth, water, and other material required for construction of its railway and telegraph lines constructed prior to the 8th day of June 1882; and

"Whereas said company is desirous of exercising said right of obtaining certain timber from the public lands of the United States, to be used in the construction of its said railway and telegraph line, and in the repair of that portion thereof constructed prior to June 8th, 1883; and

"Whereas said company can only exercise said right and take such timber through its agent duly authorized for that purpose:

"Now, therefore, be it known, that the said The Denver and Rio Grande Railroad Company doth hereby make, constitute, and appoint the following-named persons, to wit:

"The New Mexico Lumber Company of Azotea, New Mexico, its true and lawful agents to enter upon the public lands of the United States, adjacent to, or in the neighborhood of its line of railway, constructed or in process of construction, as aforesaid, on its behalf and under its direction, as hereinafter described, and for it to take therefrom such timber as may be necessary for the construction of its railway lines, and the repair of portions of the same, as above stated, and which is to be by it used in that behalf, as provided in the aforesaid acts of Congress.

25 "And be it further known, that the appointment and authorization hereby granted to the persons above named do not extend beyond the right to procure, as aforesaid, timber necessary for the purposes aforesaid, and do not confer upon the said person the right to commit any waste upon the public lands, or to cut, destroy, or take away any timber not required for the purposes aforesaid (and such cutting, destruction, and taking away of timber is hereby expressly prohibited), nor to commit any trespass or waste, as against the property of any private individuals owning or possessed of any property adjacent to or in the neighborhood of the lines of said railroad.

"And be it further known that none of the persons hereby appointed as aforesaid has or shall have any authority by virtue hereof to cut or

remove any timber as aforesaid, except so far and to such an extent and in respect to such amounts or quantities as said persons may be specially in writing authorized so to do.

"Dated at Denver, Colorado, this 14th day of March, A. D. 1893.

"The Denver and Rio Grande Railway Company," by C. M. Hobbs, purchasing agent.

"Be it known that we, the undersigned, the persons appointed in the foregoing instrument for the purpose therein mentioned, do hereby accept the appointment and agency thereby made and for the purpose therein set forth, and in consideration of said appointment we hereby agree and pledge ourselves: First, that in the cutting and procuring of timber as authorized by the terms of said instrument, we will not commit any waste upon the public lands, nor cut nor carry away any timber therefrom except for the sole purpose of supplying the said railroad company with the timber which may be required by it for the construction or repairs of its said railway lines, and that we will cut and procure the said
26 timber for the said purposes in such manner and in such amount only as we may from time to time be specially and in writing authorized so to do by the said railroad company; second, that we will commit no trespasses or waste against the property of any private individuals ow'ing or possessed of any property adjacent to or in the neighborhood of the said railroad; third, that in the cutting and procuring of the said timber for the said purpose, and to prevent the spread of fires upon public lands, we will cut or remove no timber less than eight inches in diameter, and will cut and pile the tops and laps of all trees felled in the procuring of the timber as aforesaid; fourth, that we will indemnify and save harmless the said railroad company against any trespass or waste committed by us upon the public lands and against any trespass or damage to the right of private individuals done by us or under us in violation of this appointment.

"Dated this 14th day of March, year of our Lord 1893.

"(Signed) NEW MEXICO LUMBER COMPANY.

"Correct copy.

"C. M. HOBBS,
"*Purchasing Agent.*"

Mr. VAILE. We offer in evidence Exhibit D, being the form of order under which the timber referred to in this controversy was cut and delivered to the railroad company, as follows:

"EXHIBIT D.

"ORDER NO. .

"PURCHASING AGENT'S OFFICE,
"DENVER AND RIO GRANDE RAILROAD COMPANY,
"*Denver, Colo.*, , *189* .

"To the NEW MEXICO LUMBER COMPANY:

"Whereas, by an instrument in writing, bearing date March 14th, 1893, you are appointed one of the lawful agents of the Denver
27 and Rio Grande Railroad Company to procure for and on its behalf from the public lands of the United States such timber as

may be necessary in the construction and repairing of the railway lines of the said railroad and for such purposes and under such conditions as are fully set forth in said instrument in writing; and

"Whereas you did, on the 14th day of March, 1893, accept such appointment as agent for said purposes and under said conditions:

"Now, therefore, in pursuance of said appointment and said acceptance, and in accordance with the conditions, terms, and stipulations therein contained, you are hereby authorized, for the said The Denver and Rio Grande Railroad Company, and on its behalf, to enter upon the public lands of the United States and to cut and procure timber thereon in the manner and in the amounts and within the time as follows, to wit:

(Here follows description of material required, differing in different orders.)

"Consign above timber .

"Care of .

"C. M. HOBBS,
Purchasing Agent."

Mr. VAILE. This is the case for the defendant.

The COURT. I will give the instruction No. 2 asked for by the defendants:

"The court instructs the jury that by the act of Congress of the United States the defendant railroad company had the right to take from the public lands in the declaration described such timber as was required for the repair to that part of its railroad and telegraph lines constructed prior to June 8th, 1882; that having such lawful right to cut timber on said lands for the purposes mentioned, the law presumes that whatever cutting was done there by it, or under its authority,
28 was in furtherance of the objects permitted by said statute and that the railroad company in so doing was acting in accordance to and within the terms of the said act of Congress and not in violation thereof. Under these circumstances the burden in this case is on the plaintiff to establish affirmatively, by a preponderance of the evidence, that the timber in the declaration mentioned was actually taken by the railroad company from the specific lands named in the declaration, and was used for some purpose or at some place not contemplated by the act of Congress. The plaintiff having offered no evidence to show that the defendant did use such timber for any purpose or at any place not so contemplated by said act of Congress, you are instructed to find a verdict for the defendant."

Mr. JONES. I except to the instruction of the court, for the reason that the instruction, as given, in effect instructs the jury that all of the lands described in the declaration, and from which the timber was taken, are "adjacent" to the line of the road, whereas there is in the evidence no proof which shows that all of the lands described in the declaration were "adjacent;" and that the question of adjacency is a mixed question of law and fact, and should have been submitted to the jury. Secondly, the instruction is erroneous in the statement of the proposition of law, that in a case of this nature the defendant is presumed to have taken the timber for the purposes authorized by the act of Congress of June 8th, 1872.

Further, the instruction presumes that the defendant is entitled to the benefit of the act of Congress of June 8th, 1872, whereas the same is null and void for uncertainty.

Again, the instruction is erroneous because it places upon the plaintiff the burden of proof to show that the timber delivered to the railroad company was not taken by it for the purposes mentioned in the act of Congress of June 8th, 1872.

29 Again, because the instruction ignores the rule of law, that the question as to whether the timber was taken for the purposes specified in the act of Congress, the repair of that part of its road constructed prior to the 8th of June, 1882, is within the peculiar knowledge of the defendant, and that it must be shown by the defendant.

Mr. JONES. The plaintiff further desires to except to the action of the court in refusing to give the instructions asked for by the plaintiff in the case; and, as to the instruction given, we desire to make the further objection that the court has failed to instruct the jury as to the law of the case.

The COURT. Gentlemen, I will hand you a form of verdict which one of your number may sign as foreman.

Mr. JONES. I will give formal notice of a motion for a new trial.

And be it further remembered that, upon the trial of said cause, the said plaintiff filed in said cause a stipulation which is in words and figures as follows, to wit:

In the district court of the first judicial district of the Territory of New Mexico, sitting in and for the county of Santa Fe.

THE UNITED STATES
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 842.

Agreed statement of facts.

For the purpose of trial and determination of the issues in the above-entitled cause, it is agreed that the facts offered by the plaintiff are as hereinafter set forth, and so far as the same are competent, material, and relevant the facts so agreed upon shall be taken as proved, but

30 the defendant shall have the right upon the trial to object to the introduction in evidence of said facts or any of them, on the ground that though admitted to be true they are incompetent, immaterial, or irrelevant.

1. Prior to the beginning of this suit the New Mexico Lumber Company, a corporation, was engaged in the general logging and lumbering business, and had a sawmill at Lumberton, on the Denver & Rio Grande Railroad, the same being on or in the immediate vicinity of the lands described in the plaintiff's declaration.

2. Prior to the beginning of this suit, the said the New Mexico Lumber Company did cut from the lands described in the declaration 2,100,000 feet of lumber, and the same to that amount was furnished to and received by the defendant railroad company for its use.

3. Prior to the time of said cutting, the said lands were public lands of the United States, situated in Rio Arriba County, New Mexico.

4. That the stumpage value of said timber so cut and delivered to the defendant railroad company was then $2.00 per 1,000 feet, and the value of the said lumber in the manufactured state was $9.00 per 1,000 feet.

5. The said New Mexico Lumber Company delivered the said 2,100,000 feet of lumber to the defendant railroad company during the period of time extending from January 1, 1894, to August 1, 1895, and during such period of time said lumber company, without authority from the defendant railway company, also cut from the lands described in the declaration 5,400,000 feet of lumber in addition to that delivered to the defendant company; that during said period of time the said lumber company did not cut from private lands exceeding 100,000 feet; that the timber taken by the said lumber company from the lands de-
31 scribed in the declaration was taken, as reached upon the said lands, without reference to size or dimensions, and all available sawmill timber was taken by the said company from the said lands and the logs piled upon the sawmill yard without reference to whether they would be used in filling orders from the defendant railroad company or not; that the agents of the said lumber company, at the time of the cutting of the said timber by it, knew that the said lands were the public lands of the United States, and that the said 5,400,000 feet of lumber was sold by the said lumber company upon the general market in the State of Colorado. Suit has heretofore been brought by the United States against said The New Mexico Lumber Company for said 5,400,000 feet of lumber and final settlement has been made of the suit so brought; that plaintiff does not seek in the present action to recover from the defendant railroad company anything for the taking by the said lumber company from said lands of the 5,400,000 feet above referred to, but no suit is pending against The New Mexico Lumber Company for the above mentioned 2,100,000 feet of lumber, nor has the plaintiff had any recovery or judgment for the same.

W. B. CHILDERS,
A. A. JONES,
Attorneys for Plaintiff.
WOLCOTT & VAILE,
E. L. BARTLETT,
Attorneys for Defendant.

And be it further remembered that upon the trial of said cause the said defendant filed in said cause a stipulation which is in words and figures as follows, to wit:

In the district court of the first judicial district of the Territory of New Mexico, sitting in and for the county of Santa Fe.

32 THE UNITED STATES
vs.
THE DENVER & RIO GRANDE RAILROAD Company. } No. 842.

Agreed statement of facts.

For the purpose of trial and determination of the issues in the above-entitled cause it is agreed that the facts offered by the defendant are as

hereinafter set forth, and so far as the same are competent, material, and relevant, the facts so agreed upon shall be taken as proved, but the plaintiff shall have the right upon the trial to object to the introduction in evidence of the said facts or any of them on the ground that, although admitted to be true, they are incompetent, immaterial, or irrelevant.

1. It is agreed that the defendant, The Denver & Rio Grande Railroad Company, is the successor to the Denver & Rio Grande Railway Company and at all times herein mentioned has been entitled to all the rights and benefits lawfully conferred upon the said The Denver & Rio Grande Railway Company by an act of Congress approved June 8th, 1872, entitled "An act granting the right of way through the public lands to the Denver & Rio Grande Railway Company," the same being found in 17 U. S. Statutes at page 339, to which reference is hereby made, and which said statute is made a part of this agreed statement and copy thereof is hereto attached and marked Exhibit A; and that said defendant railroad company is also entitled to all rights and benefits arising from the act of Congress approved March 1, 1877, amendatory of said right of way act, said amendatory act being found in volume 19 of U. S. Statutes at page 405, to which reference is hereby made, and said statute is made a part of this agreement of facts and copy thereof is hereto attached and marked Exhibit B.

33 2. That on the 8th day of June, 1882, The Denver and Rio Grande Railway Company, acting under and in accordance with the statutes of June 8th, 1872, and March 1, 1877, hereinabove cited, had constructed 1,130 miles of its railway lines, and subsequent to the said 8th day of June, 1882, the said railway company and its successor in interest, the defendant The Denver and Rio Grande Railroad Company, proceeded under the act of Congress of March 3rd, 1875 (U. S. Statutes, page 482), constructed 536 miles of railway in addition to said 1,130 miles theretofore constructed, no portion of which new construction was in the vicinity of the said lands described in plaintiff's declaration.

3. That the railroad lines so constructed prior to June 8th, 1882, extended through a portion of the lands described in plaintiff's declaration in this cause, and for a distance of more than 100 miles west and 400 miles east and north from said lands.

4. That before the cutting of any of the 2,100,000 feet of lumber in the plaintiff's statement mentioned, the defendant railroad company appointed the said The New Mexico Lumber Company as its agent, to procure for it timber from the public lands of the United States, the appointment so made was in writing, and copy thereof and of the acceptance of the same is hereto attached and made part hereof and marked Exhibit C.

5. That all of said 2,100,000 feet of lumber delivered to the defendant railroad company as aforesaid, was furnished upon specific orders in writing, given by the defendant railroad company to said The New Mexico Lumber Company as its agent, said orders being in the general form, copy of which is hereto attached and made a part hereof and marked Exhibit D.

6. That all of said 2,100,000 feet of lumber so received by the defendant railroad company was cut from trees standing within a maximum distance of three miles from the main line of the defendant railroad

34 company; that about one-third of the whole amount was cut within one mile of said railroad line, one-third at a distance of

more than one mile, but not exceeding two miles, and the remaining one-third at a distance of more than two miles, but not exceeding three miles from the said railroad line.

W. B. CHILDERS,
A. A. JONES,
Attorneys for the Plaintiff.
WALCOTT & VAILE,
E. L. BARTLETT,
Attorneys for Defendant.

And be it further remembered that thereafter on the 14th day of September, A. D. 1900, the plaintiff filed in said cause its motion for a new trial, which said motion is in words and figures as follows:

In the district court of the first judicial district of the Territory of New Mexico.

UNITED STATES OF AMERICA, PLAINTIFF,
vs.
THE DENVER AND RIO GRANDE RAILROAD COMPANY, defendant. } No. 842.

Motion for a new trial.

Now comes the plaintiff in the above-entitled cause, by W. B. Childers and A. A. Jones, its attorneys, and moves the court to set aside a verdict of the jury heretofore at this term rendered in said cause, and to grant to the plaintiff a new trial thereof, and in support of said motion and as grounds therefor, the plaintiff says:

1st. The court erred in admitting in evidence at the request of the defendant, over the objections of the plaintiff, the act of Congress approved June 8th, 1872, and a copy of which said act was so introduced in evidence over the objection of the plaintiff, and marked Exhibit A.

2d. The court erred in admitting in evidence at the request of the defendant, and over the objection of the plaintiff, the act of Congress approved March 1st, 1877, and a copy of which was offered in evidence and marked Exhibit B.

3d. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts stated in paragraph two or division two of the agreed statement of facts offered by the defendant.

4th. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts stated in clause four of the agreed statement of facts offered in evidence by the defendant, and also erred in admitting in evidence over the objection of the plaintiff, the appointment of the New Mexico Lumber Company as the agent of the defendant, and the acceptance of the same, said appointment and the acceptance being introduced in evidence and marked Exhibit C.

5th. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts stated in paragraph five of the agreed statement of facts offered by the defendant, including the form of written orders marked Exhibit D.

6th. The court erred in admitting in evidence at the request of the defendant and over the objection of the plaintiff, the facts set forth in clause six of the agreed statement of facts offered by the defendant.

7th. The court erred in refusing to instruct the jury upon the request of the plaintiff as follows, to wit: The jury is instructed to return a verdict in favor of the plaintiff and against the defendant, for the sum of $18,000.

36 8th. The court erred in instructing the jury to find and return a verdict for defendant.

9th. The court erred in giving the second instruction requested by the defendant.

10th. The court erred in instructing the jury that the defendant had the right to take from the public lands in the declaration described, such timber as was required for the repairs to that part of its railway and telegraph lines constructed prior to June 8th, 1882.

11th. The court erred in instructing the jury that the law presumes that whatever cutting was done on the lands described in the declaration by the defendant, or under its authority, was in furtherance of the objects permitted by the statute of June 8th, 1882.

12th. The court erred in instructing the jury that the burden of proof in this case was on the plaintiff to establish affirmatively by the preponderance of the evidence that the timber in the declaration mentioned was actually cut by the railroad company from the specific lands named in the declaration, and was used for some other purpose or at some place not contemplated by the act of Congress of June 8th, 1872.

13th. The court erred in holding that the lands described in the declaration, and from which the timber was cut and delivered to the defendant company were adjacent to the line of the defendant's railroad constructed prior to June 8th, 1882.

14th. Because the verdict of the jury is contrary to the law and the evidence in the case.

Wherefore, the plaintiff prays the court to set aside the verdict and to grant it a new trial in said cause.

W. B. CHILDERS,
A. A. JONES,
Attorneys for the Plaintiff.

37 It is hereby agreed that the foregoing bill of exceptions may be settled, signed, and sealed by the judge of said court as the bill of exceptions on which the judgment in said cause may be reviewed by the supreme court, and further notice and time for proposing amendments thereto or for settling said proposed exceptions is waived.

W. B. CHILDERS,
A. A. JONES,
Attorneys for the Plaintiff.

WOLCOTT & VAILE,
E. L. BARTLETT,
Attorneys for Defendant.

And for as much as the matters herein set forth do not appear of record in this cause, the plaintiff hath prayed that the foregoing matters

and things be made a part of and constitute his bill of exceptions, in order that the same may become a part of the record in said cause, said bill of exceptions containing all of the evidence offered upon the trial of said cause, the foregoing bill of exceptions is hereby made a part of the record in this cause, and the same is signed and sealed this the 10th day of November, A. D. 1900.

[SEAL.]

JOHN R. MCFIE,
Associate Justice.

[Endorsements.]

No. 842.

District court, first judicial district.

UNITED STATES
vs.
DENVER & RIO GRANDE RAILROAD Company.
} Bill of exceptions.

Filed in my office Nov. 10th, 1900.

A. M. BERGERE, *Clerk.*

38 TERRITORY OF NEW MEXICO,
First Judicial District.

I, A. M. Bergere, clerk of the district court of the first judicial district of the Territory of New Mexico, do hereby certify that the foregoing thirty-five pages contain a true, correct, and complete transcript of the record and proceedings had in a cause lately pending in said court, wherein the United States of America was plaintiff and the Denver & Rio Grande Railroad Company was defendant, as the same now appears of record in my said office.

In witness whereof I have hereunto set my hand and the seal of said district court, at my office in the city of Santa Fe, district and Territory aforesaid, this 16th day of November, A. D. 1900.

[SEAL.]

A. M. BERGERE,
Clerk U. S. Court.

39 And afterwards, on, to wit, the ninth day of January, A. D. 1901, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an assignment of errors, which said assignment of errors was and is in words and figures as follows, to wit:

In the supreme court of the Territory of New Mexico, January term, A. D. 1901.

UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE DENVER & RIO GRANDE RAILroad Company, defendant in error.
} No. 885. Error to the district court, first judicial district.

Assignment of errors.

Now comes the plaintiff in error, the United States of America, by her attorneys, and says, that in the record and proceedings of the district

court of the first judicial district of the Territory of New Mexico in the above-entitled cause there is manifest error in this, to wit:

First. The court erred in admitting in evidence at the request of the defendant, over the objections of the plaintiff, the act of Congress approved June 8th, 1872, and a copy of which said act was so introduced in evidence over the objection of the plaintiff, and marked "Exhibit A."

2nd. The court in admitting in evidence at the request of the defendant, and over the objection of the plaintiff, the act of Congress approved March 1st, 1877, and a copy of which was offered in evidence and marked "Exhibit B."

40 3rd. The court erred in admitting in evidence, at the request of the defendant, the facts stated in paragraph two or division two of the agreed statement of facts offered by the defendant.

4th. The court erred in admitting in evidence, at the request of the defendant, and over the objection of the plaintiff, the facts stated in clause four of the agreed statement of facts offered in evidence by the defendant; and also erred in admitting in evidence, over the objection of the plaintiff, the appointment of the New Mexico Lumber Company as the agent of the defendant, and the acceptance of the same, said appointment and acceptance being introduced in evidence and marked "Exhibit C."

5th. The court erred in admitting in evidence, at the request of the defendant, and over the objection of the plaintiff, the facts stated in paragraph five of the agreed statement of facts offered by the defendant, including the form of written orders marked "Exhibit D."

6th. The court erred in admitting in evidence, at the request of the defendant, and over the objection of the plaintiff, the facts set forth in clause six of the agreed statement of facts offered by the defendant.

7th. The court erred in refusing to instruct the jury upon the request of the plaintiff, as follows, to wit:

"The jury is instructed to return a verdict in favor of the plaintiff, and against the defendant, for the sum of $18,000."

8th. The court erred in instructing the jury to find and return a verdict for the defendant.

9th. The court erred in giving the second instruction requested by the defendant.

41 10th. The court erred in instructing the jury that the defendant had the right to take from the public lands, in the declaration described, such timber as was required for the repairs to that part of its railway and telegraph lines constructed prior to June 8th, 1882.

11th. The court erred in instructing the jury that the law presumes that whatever cutting was done on the lands described in the declaration by the defendant, or under its authority, was in furtherance of the objects permitted by the statute of June 8th, 1882.

12th. The court erred in instructing the jury that the burden of proof in this case was on the plaintiff to establish affirmatively by the preponderance of the evidence that the timber in the declaration mentioned was actually cut by the railroad company from the specific lands named in the declaration, and was used for some other purpose or at some place not contemplated by the act of Congress of June 8th, 1872.

13th. The court erred in holding that the lands described in the declaration, and from which the timber was cut and delivered to the

defendant company, were adjacent to the line of the defendant's railroad constructed prior to June 8th, 1882.

14th. Because the verdict of the jury is contrary to the law and the evidence in the case.

15th. The court erred in overruling the motion for a new trial filed by the plaintiff in said cause.

Wherefore, for the above and many other manifest errors in said record appearing on the face thereof, plaintiff in error prays that the
42 judgment of the district court in said cause be reversed and held for naught and that this court may enter up judgment in this case in favor of the plaintiff for the sum of $18,900.00.

(Signed) ANDRIEUS A. JONES,
Special Assistant United States Attorney.

(Signed) WM. B. CHILDERS,
United States District Attorney.

Which said assignment of errors were endorsed as follows, to wit:

No. 885. In the supreme court of the Territory of New Mexico. January term, A. D. 1901.

UNITED STATES OF AMERICA, PLAINTIFF in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	Error to district court first judicial district.

Assignment of errors.
Filed in my office this Jan. 9, 1901.

JOSE D. SENA, *Clerk.*

And afterwards on, to wit, at a regular term of the supreme court of the Territory of New Mexico, begun and held at Santa Fe, the seat of government, on the first Wednesday after the first Monday in January, A. D. 1901, on the twelfth day thereof, the same being Tuesday, the 22nd day of January, the following among other proceedings were had as follows, to wit:

43 THE UNITED STATES OF AMERICA, plaintiff in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court first judicial district.

It is ordered by the court that this cause be, and it is hereby, set for hearing for the 23rd day of January, A. D. 1901.

And afterwards on, to wit, on the thirteenth day of said regular term, the same being Wednesday, January 23rd, A. D. 1901, the following, among other proceedings, were had as follows, to wit:

THE UNITED STATES OF AMERICA, plaintiff in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court first judicial district.

This cause coming on to be heard upon the transcript of record, assignment of errors, and briefs of counsel, is argued by A. A. Jones, esq., for plaintiff in error, and Wm. Field, esq., and E. L. Bartlett, esq., for defendant in error, and submitted to the court, and the court not being sufficiently advised in the premises, takes the same under advisement.

And afterwards on, to wit, on the thirtieth day of said regular term, the same being Wednesday, the 2nd day of October, A. D. 1901, the following, among other proceedings, were had as follows, to wit:

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THE UNITED STATES OF AMERICA, plaintiff in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court first judicial district.

This cause having been argued by counsel, and submitted to and taken under advisement by the court upon a former day of the present term, and the court being now sufficiently advised in the premises, announces its decision by Associate Justice Parker, Chief Justice Mills, and Associate Justices Crumpacker and McMillan, concurring, affirming the judgment of the court below, for reasons stated in the opinion of the court on file; it is therefore considered and adjudged by the court that the judgment of the district court in and for the first judicial district, whence this cause came into this court, be, and the same hereby is, affirmed, and that in accordance therewith, it is ordered, considered, and adjudged by the court that the said defendant in error, The Denver & Rio Grande Railroad Company, as to said charge, go hence without day, and it hereby is discharged, and it is so ordered.

And afterwards on, to wit, on the 14th day of January, A. D. 1902, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico an affidavit of value, which said affidavit of value was, in words and figures, as follows, to wit:

In the Supreme Court United States of America.

UNITED STATES OF AMERICA, PLAINTIFF IN error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	Error to the supreme court of the Territory of New Mexico.

45 Andrieus A. Jones, of lawful age, being duly sworn, upon his oath says: That he, as special assistant United States attorney, represented the plaintiff in error in the above-entitled cause in the district court and supreme court of the Territory of New Mexico, and that the value of the matter in dispute is more than five thousand ($5,000) dollars.

(Signed) ANDRIEUS A. JONES.

TERRITORY OF NEW MEXICO,
County of San Miguel, ss:

On this 11th day of January, A. D. 1902, before me, the undersigned, a notary public in and for the county and Territory aforesaid, personally came Andrieus A. Jones, who, being by me duly sworn, did depose and say that the foregoing affidavit by him subscribed is true.

Witness my hand and notarial seal the day and year last above written.

[SEAL.] (Signed) W. E. GORTNER,
Notary Public.

My commission expires February 11th, 1904.

Said affidavit was and is endorsed as follows:

In the supreme court Territory of New Mexico.

THE UNITED STATES OF AMERICA, PLAINTIFF in error,
vs.
THE DENVER & RIO GRANDE RAILROAD COMPANY, defendant in error.
} Affidavit of value.

Filed in my office this Jan. 14, 1902.

JOSE D. SENA, *Clerk.*

46 And afterwards, on, to wit, the 14th day of January, A. D. 1902, there was filed in the office of the clerk of the supreme court of the Territory of New Mexico a precipe for a writ of error and citation to the Supreme Court of the United States, which said precipe was and is in words and figures as follows, to wit:

"JANUARY 10TH, 1902.

"Hon. JOSE D. SENA,
"*Clerk of the Supreme Court, Santa Fe.*

"DEAR SIR: Will you please issue a writ of error in the usual form for the transfer to the Supreme Court of the United States from the supreme court of the Territory of New Mexico that certain cause lately decided *decided* in said supreme court of the Territory of New Mexico, numbered 885, wherein the United States of America was plaintiff in error and The Denver & Rio Grande Railroad Company was the defendant in error.

"You will please also issue a citation and forward the same to me for service.

"I enclose an affidavit of the amount involved in the suit which you will please file with the other papers in the case.

"Very truly, yours,

"A. A. JONES,
"*Special Assistant U. S. Attorney.*"

And afterwards, on, to wit, the 2nd day of October, there was filed in the office of the clerk of the supreme court an opinion of the court, which said opinion is in words and figures as follows, to wit:

47 In the supreme court of the Territory of New Mexico, January term, A. D. 1901.

UNITED STATES OF AMERICA, PLAINTIFF in error, *vs.* THE DENVER & RIO GRANDE RAILROAD Company, defendant in error.	No. 885. Error to district court, first judicial district.

SYLLABUS.

1. Under the act of the Territorial legislature, approved February 7th, 1899 (session laws of 1889, page 45), it was not necessary to plead special acts of Congress to authorize their introduction in evidence.

2. The decision of this court upon a first writ of error upon all points actually and necessarily determined becomes the law of the case and binding upon the parties and this court upon a second writ of error, when the facts are substantially the same in both instances. The rule also includes all questions necessarily determined in reaching the specific decision announced.

3. Lands within three miles of the track of the Denver & Rio Grande Railroad Company are "adjacent" lands within the meaning of the acts of Congress of June 8th, 1872 (17 Stat., 339), and March 1, 1877 (19 Stat., 405).

ANDRIEUS A. JONES,
Special Assistant U. S. Attorney.
W. B. CHILDERS,
United States Attorney for Plaintiff in Error.
WALCOTT & VAILE,
WILLIAM W. FIELD, and
EDWARD L. BARTLETT,
For Defendant in Error.

OPINION OF THE COURT.

PARKER, J.:

This case was in this court before, and was reversed and remand-
48 ed for a new trial. (9 N. M., 382.) At that time we determined, from the record before us, that the defendant in error, under certain special acts of Congress, had the right to cut such timber from the public lands adjacent to its line as was necessary for the repair of such portion of its road as was constructed prior to June 8th, 1882. We further determined that the burden of proof to show a violation of the terms of the grant was upon the United States. The case was retried, under the mandate of this court, and the proofs submitted were, in substance and effect, the same as on the former trial. At the close of the testimony the court directed a verdict for the defendant in error.

The proof showed that the defendant in error, through its agent, cut and used 2,100,000 feet of lumber from trees standing within a maximum distance of three miles from its main line of track. No proof was offered by either party as to what use was made of such lumber.

Plaintiff in error complains of the judgment for the following reasons:

First. Upon the case made out by the plaintiff the court should have instructed the jury to return a verdict for the plaintiff for the sum of

$18,000, and, if no proper defense was made, the court should now enter up judgment against the defendant for that amount.

Second. If the defendant relied upon the special acts of Congress as a defense, it was necessary that such acts should have been specially pleaded.

Third. The burden of proof was on the defendants to show that the timber was taken for the purpose authorized by the special acts of Congress, and no evidence for this purpose was offered.

Fourth. The act of Congress of June 8th, 1872, so far as the same related to the taking of timber from the public lands for the purpose of repairing defendant's road, is void.

49 Fifth. If the act was not void, the land from which the timber was taken was not all adjacent to the line of defendant's road.

1. The second point presented—as to the inadmissibility of the special acts of Congress under the pleadings—will be first noticed. The declaration in this case was framed in accordance with the provisions of an act of the Territorial legislature approved February 7th, 1889 (Session Laws of 1889, p. 45); likewise the plea in the case was framed in accordance with the provisions of that act. That act provided certain short forms of pleading, which were declared to be sufficient in all actions at law. An entire departure was contemplated by this act from the established forms and requirements of common-law pleading, and while it may be conceded as a general proposition that special acts of a legislature must be pleaded before they will be admissible in evidence, still we are not prepared to say that, in view of the radical changes made by this statute, these acts of Congress were not admissible under the plea of not guilty filed by the defendant in error in this case. No useful purpose could be subserved in remanding this cause for a new trial upon the ground that the acts of Congress mentioned were improperly admitted in evidence, as the defendant in error would be at liberty to at once amend his plea in this regard, if necessary, and a retrial of this cause would necessarily result in the same judgment.

We therefore hold that the special acts of Congress introduced by defendant in error were properly admissible under the plea filed in this cause, and that the second assignment of error is consequently not well founded.

2. The third question presented is in regard to the burden of proof as to the lawful or unlawful use of timber by defendant in error. This question was determined by this court on the former appeal, and we held the burden to be upon the United States.

50 The fourth claim is that these acts of Congress are void for uncertainty, by reason of the use of the word "adjacent" to indicate the lands from which timber may be cut by defendant in error, and which it is claimed is so incapable of definition as to render the acts void. This was necessarily determined adversely to the plaintiff in error on the former appeal, when we declared that the acts were a solemn grant to the defendant. It would be absurd to say that these acts were a solemn grant of a right to the defendant in error, if they were at the same time so uncertain in terms so as to be void. It was necessary for this court to determine that they were valid in order to say that they were a solemn grant to the defendant in error.

The determination that the burden of proof, as to the lawful or unlawful

use of the timber by the defendant in error, was upon the Government, necessarily determines the first question presented, for no proof whatever was tendered by the Government to meet this burden. Consequently, no right of recovery was shown. Under these circumstances it is contended by the defendant in error that plaintiff in error is concluded by the former judgment of this court, and we think the contention well founded. It is an established and almost universally recognized rule that every question which is actually and necessarily determined in a case by an appellate court is "the law of the case," and, right or wrong, is conclusively binding upon the parties and the courts until overruled by some higher court of appeal. Elliott's Appellate Procedure, sec. 578; 2 Ency. P. & P., 372-381; Note to Hastings v. Foxworthy, 34 L. R. A. 321, sec. 45 Neb., 676; Balch v. Hass, 73 Fed., 974; Thatcher v. Gottlieb, 59 Fed., 872; Barney v. R. R. Co., 117 U. S., 228; Bridge Co. v. Stewart, 3 How. (U. S.), 413; Tyler v. Magwire, 17 Wall. (U. S.), 253; Supervisors v. Kennicott, 94 U. S., 498; Clark v. Keith, 106 U. S., 464; Rupe v. New Mexico Lumber Association, 3 N. M., 555; Green v. Springfield, 130 Ills., 515; Crary v. Field et al. (N. M.), 61 Pac., 118.

51 This rule applies not only to questions specifically decided, but also to those questions which are necessarily involved in reaching the decision specifically announced. Hutchison v. Railway Co., 41 Wis., 541; Headley v. Challiss, 15 Kan., 453, per Brewer, J.; Croockett v. Gray, 31 Kan., 346; Joslin v. Cowee, 56 N. Y., 626; Williams v. Rogers, 14 Bush. (Ky.), 776; Stuart v. Heiskell, 86 Va., 191; and see note to Hastings v. Foxworthy, 34 L. R. A., 321; 2 Ency, P. & P., 380.

While in our former decision only one of these questions was specifically presented and decided, the other was necessarily involved in determining this one question. When we said that these acts of Congress were a solemn grant to the defendant in error, we decided, necessarily, that they were valid. If the plaintiff in error had anything to say upon this subject it had at that time an opportunity to speak and urge all of the propositions now presented. Consequently we hold that the United States cannot now be heard, not only tne parties, but also the court, being bound by the former judgment.

3. The last question presented is as to whether lands within three miles of the track of defendant in error are "adjacent," within the meaning of the acts of Congress referred to. No point is made that the facts should have been submitted to the jury under proper instructions, but the bare legal proposition is presented that as a matter of law these lands are not "adjacent" to the road. We will content ourselves by citing one case which arose in this jurisdiction and which seems conclusive. Bacheldor v. United States, 83 Fed., 986. This case arose by way of a prosecution by the United States for unlawful timber cutting. The defendant justified as agent of this same defendant in error, and under these same acts of Congress. The court held that lands twenty-five miles distant by wagon road from the railroad could not be held as a matter of law

52 not to be adjacent, within the meaning of these acts of Congress. This reversed this court in the same case, 9 N. M., 15. We are not aware of any decision of the United States Supreme Court which has modified or overruled this case. We therefore hold that lands within three miles of the railroad of defendant in error are "adjacent" lands within the meaning of the grant to it by Congress.

For the reasons assigned, the judgment below will be affirmed. And it is so ordered.

FRANK W. PARKER,
Associate Justice.

We concur: William J. Mills, C. J., J. W. Crumpacker, A. J., Daniel H. McMillan, A. J.

McFie, J., having tried the case below, took no part in this decision.

Filed October 2nd, 1901.

TERRITORY OF NEW MEXICO,
Supreme Court, s. s.

I, clerk of the supreme court of the Territory of New Mexico, do hereby certify that the foregoing is a full, true, complete, and perfect transcript of the record and proceedings, pleadings, and opinion filed in the above entitled cause which is transmitted to the Supreme Court of the United States in accordance with the writ of error hereto attached.

Witness my hand and the seal of the supreme court of the Territory of New Mexico, this the 16th day of January, A. D., 1902.

[SEAL] JOSÉ D. SENA,
Clerk Supreme Court of New Mexico.

53 *The United States of America, to the Denver and Rio Grande Railroad Company, greeting:*

You are hereby cited and admonished to be and appear at a term of the Supreme Court of the United States, to be holden at Washington, within sixty days from the date hereof, pursuant to a writ of error, filed in the clerk's office of the supreme court of the Territory of New Mexico, wherein the United States of America was plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as the said writ of error mentioned, should not be corrected, and why speedy justice should not be done in that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this the 14th day of January, A. D. 1902.

[SEAL.] WILLIAM J. MILLS,
Chief Justice of the Supreme Court of the Territory of New Mexico, etc.

Service of a copy of the above citation is hereby accepted and acknowledged this 17th day of January, A. D. 1902.

WOLCOTT & VAILE AND EDWARD L. BARTLETT,
Attorney' for defendant in error.

54 (Indorsed:) File No. 18391. Supreme Court U. S., October term, 1901. Term No. 538. The United States, plff. in error, vs. the Denver & Rio Grande R. R. Co. Citation and proof of service. Filed Feby. 11, 1902.

55 (Indorsement on cover:) File No. 18391. New Mexico Territory supreme court. Term No. 231. The United States, plaintiff in error, vs. the Denver and Rio Grande Railroad Company. Filed February 1st, 1902.

FILE COPY.

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Office Supreme Court U. S.
FILED
MAR 16 1903
JAMES H. McKENNEY,
Clerk.

In the Supreme Court of the United States.

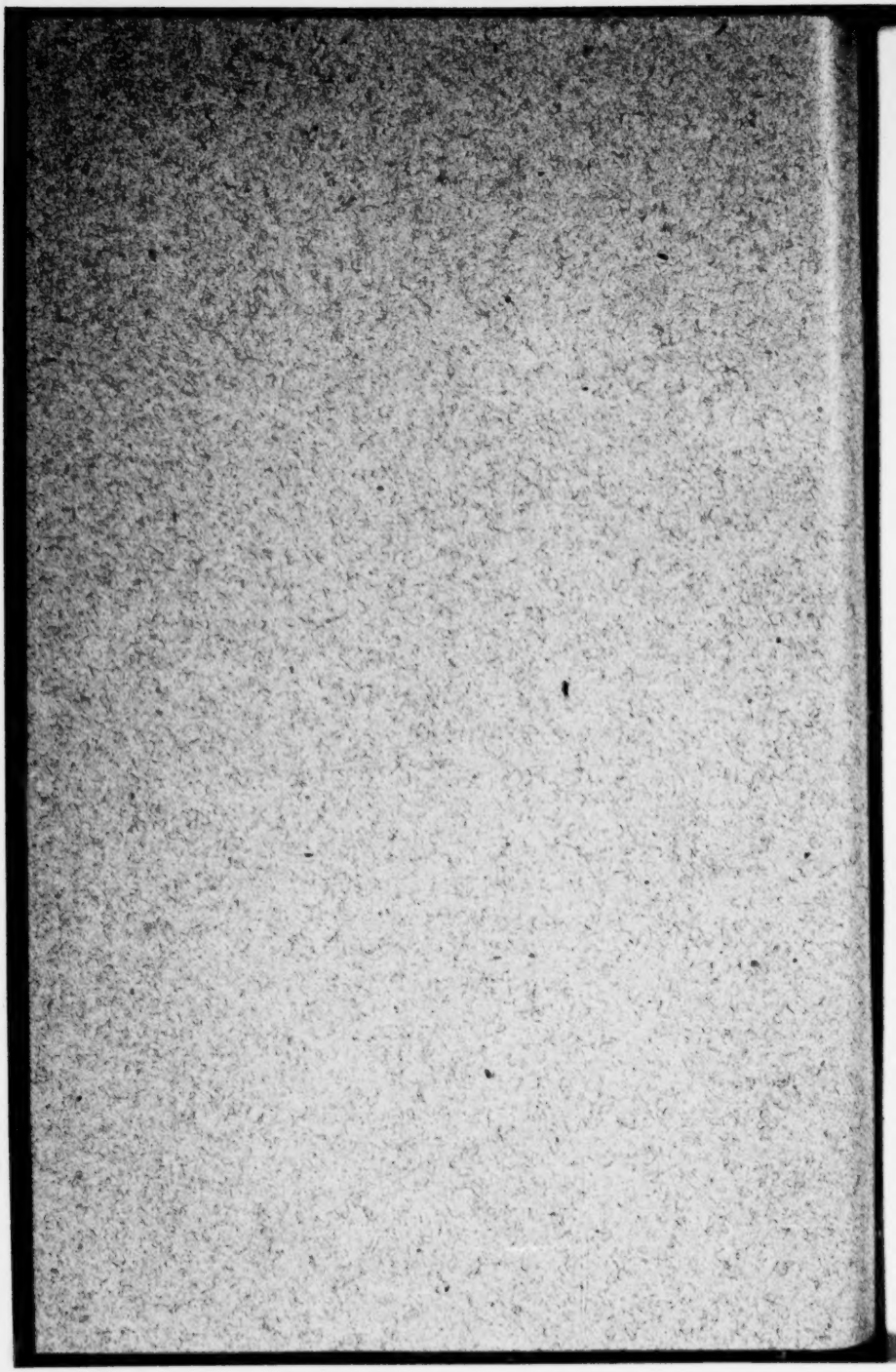
OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE DENVER AND RIO GRANDE RAILROAD Company, defendant in error.

No. 20

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR PLAINTIFF IN ERROR.



In the Supreme Court of the United States.

OCTOBER TERM, 1902.

THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE DENVER AND RIO GRANDE RAILROAD Company, defendant in error. } No. 231.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO.

BRIEF FOR PLAINTIFF IN ERROR.

STATEMENT OF CASE.

This is an action of trover brought in the first judicial district of New Mexico for the conversion of 30,000 logs of the value of $1 each, and 5,500,000 feet, board measure, of lumber and dimension timbers of the value of $12 per thousand, making a total alleged value of $96,000. The declaration was filed in April, 1896; bill of particulars of plaintiff's demand was filed in May; and defendant's plea of general issue, or "not guilty," and plaintiff's replication in May thereafter. The case was brought to trial in the district court in the month of September, 1900. It was tried upon agreed statements of facts, both as to

plaintiff's cause of action and the defense, which written statements were respectively read to a jury by counsel for the parties, subject to the usual objections as to relevancy, competency, and materiality. Plaintiff's facts, together with the objections thereto, may be found in record, pages 8 and 9; the defendant's, pages 9 to 16, inclusive. The court thereupon ordered the jury to find for the defendant, this direction being given in the form of one of the prayers for instructions offered by defendant's counsel. To this action of the court, as well as the refusal of the court to give instructions prayed by him, counsel for plaintiff duly excepted. The instructions given and the exceptions of plantiff's counsel will be found in the record, pages 16 and 17. A motion for new trial of the case, for many reasons therein set forth, was made on the same day (April 4, 1900) that the case was tried. (Rec., pp. 20–21.) This motion was overruled. (Rec., pp. 6–7.) A bill of exceptions was settled November 10, 1900; attorneys on both sides were present and signed the bill. The trial judge also signed the bill and the clerk appended a complete certificate. (Rec., pp. 7–22, inclusive.) On January 9, 1901, an assignment of errors was filed by plaintiff's attorney. (Rec., pp. 22–24.) On January 22 and 23 following the case was set down and argued in the supreme court of the Territory. (Rec., pp. 24–25.) On October 2 following the case was decided (Rec., p 25), the opinion being set forth in the record, pages 27–30, inclusive. The case was then brought here on writ of error.

QUESTIONS INVOLVED.

INSTRUCTIONS TO JURY.

The first question raised is whether, under the law and the agreed statement of facts, the trial court was right in refusing to direct a verdict for plaintiff for the agreed value of the product converted, and was right in directing a verdict for the defendant. This question grows out of the claim that the cutting was admitted in plaintiff's statement of facts; also the value of the product converted; that the land from which the product was taken was property of the United States; and that the entire defense made was under certain special acts of Congress which were not pleaded, and by virtue of which defendant could not contest under the plea of not guilty. This as to the first part of the question. As to the second part of the same, relative to the direction of the court that a verdict should be found for defendant, it grows out of the situation last above stated, and also from the contention of defendant and ruling of the court that it was the duty of the plaintiff not merely to show the conversion by defendants, but show affirmatively that the product converted was not used by defendant for construction and repair of its road, and no evidence having been offered for such purpose, that plaintiff had not made a case.

SUFFICENCY OF DEFENDANT'S PLEA.

The second question raised is whether, in an action of trover, the simple plea of not guilty is sufficient to permit the introduction in evidence of certain special

statutes upon which the defense is made, where the pleadings are framed under the code of New Mexico. This question grows out of the statutory pleadings of New Mexico. The declaration was not of the old common-law form for such a pleading in trover, but in the brief, simple language authorized by the statute. The defendant's plea was "Not guilty," and under it plaintiff's counsel contended that it was not competent to introduce a special statutory defense. Both courts below held the other way.

BURDEN OF PROOF.

The third question involved herein is the right of the court to put upon the plaintiff the burden of showing that the converted product was *not used* for the purposes mentioned in the statute under which defendant sought to justify the alleged conversion. This question arose from the nature of the special defense, which was that the defendant had a right to take the product in question for construction and repair of its road. Plaintiff's counsel contended that if permitted to make this defense, defendant must show that it was taken and used for such purpose, while the court held that plaintiff must show that the product was not only taken but was used for purposes other than such construction and repair.

ASSIGNMENT OF ERRORS.

FIRST.

The supreme court of New Mexico erred in deciding that the district court for the first district of that Terri-

tory was correct in refusing to instruct the jury, as requested by plaintiff's counsel, as follows:

> The jury is instructed to return a verdict in favor of the plaintiff and against the defendant for the sum of $18,000,

which was the agreed value of the product alleged to have been converted. And the court further erred in affirming the correctness of the instruction given to the jury, which was in the following language:

> The court instructs the jury that by the act of Congress of the United States the defendant railroad company had the right to take from the public lands in the declaration described such timber as was required for the repair to that part of its railroad and telegraph lines constructed prior to June 8, 1882; that having such lawful right to cut timber on said lands for the purposes mentioned, the law presumes that whatever cutting was done there by it, or under its authority, was in furtherance of the objects permitted by said statute, and that the railroad company in so doing was acting in accordance to and within the terms of the said act of Congress and not in violation thereof. Under these circumstances the burden in this case is on the plaintiff to establish affirmatively, by a preponderance of the evidence, that the timber in the declaration mentioned was actually taken by the railroad company from the specific lands named in the declaration, and was used for some purpose or at some place not contemplated by the act of Congress. The plaintiff having offered no evidence to show that the defendant

did use such timber for any purpose or at any place not so contemplated by said act of Congress, you are instructed to find a verdict for the defendant.

SECOND.

The supreme court of New Mexico erred in deciding that the district court was right in allowing a special defense under a private statute to be made without pleading such statute in addition to the plea of general issue or "not guilty." The defense admitted the taking and conversion of the property, but claimed that the same was permissible under a certain act of Congress granting such permission. The act was a private one, applying only to the defendant's railroad. The defendant's statement of facts embodied only this act and the alleged doings of the railroad company thereunder, and the whole of such defense was objected to in detail by plaintiff's counsel, because such defense was not properly pleaded, which objections were overruled, and to which rulings exceptions were duly taken. The statute in question is the act of June 8, 1872 (19 Stat. L., 405), and reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the right of way over the public domain, one hundred feet in width on each side of the track, together with such public lands adjacent thereto as may be needed for depots, shops, and other buildings for railroad purposes, and for yard room and sidetracks, not exceeding twenty acres at any one station, and

not more than one station in every ten miles, and the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line, be, and the same are hereby, granted and confirmed unto the Denver and Rio Grande Railway Company, a corporation created under the incorporation laws of the Territory of Colorado, its successors and assigns; and all the rights, powers, and franchises conferred by the said laws on corporations created under them for constructing and operating railroad and telegraph lines are hereby ratified and confirmed to the above-named railway company, its successors and assigns; and the same rights, powers, and franchises conferred by the general incorporation laws of the Territory of Colorado for the construction of railroads and telegraph lines are hereby granted to the said company, its successors and assigns, for the extension and operation of its railway and telegraph line in and through any contiguous territory of the United States to the northern boundary line of Mexico, subject to the compliance with the conditions and requirements of the general incorporation of such territory so far as the same are applicable and not inconsistent with the laws of the United States; and the same rights, powers, and privileges conferred upon the Union Pacific Railroad Company by section three of an act approved July second, eighteen hundred and sixty-four, are hereby conferred upon the above-named

company, its successors and assigns: *Provided*, That applications for the assessment of damages shall be made to the court, or any judge of a court having jurisdiction in the county in which the lands or premises lie: *Provided*, That said company shall complete its railway to a point on the Rio Grande as far south as Santa Fe within five years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof the rights and privileges herein granted shall be rendered null and void so far as respects the unfinished portion of said road: and, *Provided further*, That nothing in this act contained shall be construed as affirming or denying the right of any Territory to incorporate a railroad company.

Said act was amended on March 3, 1877, and said amendment reads as follows:

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That an act entitled "An act granting the right of way through the public lands to the Denver and Rio Grande Railway Company," approved June eighth, eighteen hundred and seventy-two, be, and the same is hereby, amended by making the second proviso in said act read as follows, to wit:

"*Provided*, That said company shall complete its railway as far south as Santa Fe within ten years of the passage of this act, and shall complete fifty miles additional south of said point in each year thereafter, and in default thereof the rights and privileges herein granted shall be

rendered null and void so far as respects the unfinished portion of said road."

The first objection made covering the point stated may be found in the record on page 9, and reads as follows:

> Second. Because there has been no foundation laid in this case for the introduction of this special act of Congress in the pleadings. We contend that it is the duty of the defendant to plead this act and prove it, and therefore the statement contained in that paragraph is incompetent, irrelevant, and immaterial.
>
> The COURT. The objection will be overruled.

This objection was, in substance, repeated to all the statement of facts constituting the defense. The statute of New Mexico under which the pleadings were framed, or so much thereof as apply to this assignment of error, may be found in the Laws of New Mexico, 1889, and reads as follows:

> The forms of pleadings which follows shall be sufficient in actions at law, and the like forms may be used with such modifications as may be necessary to meet the facts of the case; but whenever there shall be annexed to or filed with any pleading the original or copy of any writing in such pleading the original or copy of any writing in such pleading referred to, such writing shall be deemed a part of such pleading if the pleading in terms declares it to be so.
>
> * * * * *
>
> Forms of pleas in actions for wrongs.
>
> Fifty-third. That he is not guilty of the wrong alleged.

Fifty-fourth. *That he did what is complained of by the defendant's leave.*

Fifty-fifth. That the plaintiff was not entitled to the said way over the defendant's lands as the plaintiff has alleged.

Fifty-sixth. That the plaintiff first assaulted him and he committed the assault in his own defense.

Fifty-seventh. That the defendant, at the time of the alleged trespass, was possessed of land called "Idlewild," in ——— County, and was entitled to a way from said land over the land of the plaintiff to a public highway for himself and his servants, with horses and wagons, to go and return at all times, at his and their free will, for the more convenient occupation of the said land of the defendant, and that the alleged trespass was a use by the defendant of said way.

THIRD.

The supreme court of New Mexico erred in holding that the district court was correct in charging the jury that the burden of proof was upon the plaintiff to show that the property converted was used for some purpose or at some place not contemplated by the act of Congress. This error grows out of the statute under which defendant sought to show permission by grant of Congress. The particular clause of the statute is as follows:

> And the right to take from the public lands adjacent thereto stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line. * * *

The charge of the trial court is as follows (Rec., p. 16):

> Under these circumstances the burden in this case is on the plaintiff to establish affirmatively, by a preponderance of the evidence, that the timber in the declaration mentioned was actually taken by the railroad company from the specific lands named in the declaration, and was used for some purpose or at some place not contemplated by the act of Congress. The plaintiff having offered no evidence to show that the defendant did use such timber for any purpose or at any place not so contemplated by said act of Congress, you are instructed to find a verdict for the defendant.

The language of the supreme court in affirming the correctness of this part of the charge of the trial court is as follows (Rec., p. 28):

> The third question presented is in regard to the burden of proof as to the lawful or unlawful use of timber by defendant in error. This question was determined by this court on the former appeal, and we held the burden to be upon the United States.

ARGUMENT.

FIRST.

The court erred in refusing to instruct the jury for a verdict for plaintiff for the amount agreed upon as the value of the property converted.

It is submitted that this request was well founded. The case presented to the court and jury rested upon the agreed statement of facts. The land, at the time

of the cutting, belonged to the United States, and that it was so conceded is established by the plaintiff's statement in the following language (Rec., p. 8):

> *Third.* That at the time of said cutting said lands were the public lands of the United States situated in Rio Arriba County, N. Mex.

The amount of timber cut by the New Mexico Lumber Company was 2,100,000 feet, which was furnished to defendant. This was established by the statement of the plaintiff in the following language (Rec., p. 8):

> *Second.* Prior to the beginning of this suit the said New Mexico Lumber Company did cut from the lands described in the declaration 2,100,000 feet of lumber, and the same to that amount was furnished to and received by the defendant railroad company for its use.

The lumber was delivered to said defendant, as appears also from the plaintiff's statement in the following language (Rec., p. 8):

> *Fifth.* The said New Mexico Lumber Company delivered the said 2,100,000 feet of lumber to the defendant railroad company during the period of time extending from January 1, 1894, to August 1, 1895.

The value of the lumber was $9 per thousand feet, as appears from the statement of the plaintiff in the following language (Rec., p. 8):

> *Fourth.* That the stumpage value of the said timber which was cut and delivered to the defendant railroad company was then $2 per

> thousand feet, and the value of said lumber in the manufactured state, as delivered, was $9 per thousand feet.

It should be remembered that these facts were all signed and agreed to by the attorneys for both the plaintiff and the defendant, as appears from the record, page 18. They constitute a prima facie case coming within the rule of the Woodenware case (106 U. S., 432), which reads as follows:

> Where he is a willful trespasser, the full value of the property at the time and place of demand, or of suit brought, with no deduction for his labor and expense.

This rule would apply unless the defendant met such case by some agreed statement which could be properly introduced under the pleadings in the case; in other words, which was competent, relevant, and material. Under the plea of "not guilty" the defendant was precluded from any defense of a special nature. Objection was made to the introduction of all of the defendant's statement of facts in advance of its having been read to the jury. That objection was stated by plaintiff's counsel in the following language (Rec., p. 9):

> *Second.* Because there has been no foundation laid in this case for the introduction of this special act of Congress in the pleadings. We contend that it is the duty of the defendant to plead this act and prove it, and therefore the statement contained in that paragraph is incompetent, irrelevant, and immaterial.

This objection was made to apply to two acts of Congress, which were introduced by the plaintiff, and which have been previously quoted in full in our assignment of errors. No attempt was made in defendant's statement of facts to deny the title of the Government to the lands described in the declaration, the cutting of the timber, the amount of lumber manufactured, its delivery to the defendant company, or the value of it. The whole defense rested upon the claim of license under the acts of Congress not pleaded. Under such circumstances, in our view of the defendant's plea, the request made by plaintiff for an instruction to the jury was strictly accurate and proper. Its refusal by the court was plain error, and the approval of the supreme court of the Territory of such refusal was error. Inasmuch as the subject of this pleading will be more fully discussed further on in this argument, nothing more will now be said upon this branch of the assignment of errors.

The court also erred in instructing the jury upon several points as requested by the defendant.

The first subject of that instruction was equivalent to a ruling that the lands mentioned in the plaintiff's declaration were, *as a matter of law*, such lands as defendant had a right to take timber from for the construction and repair of its railroad and telegraph lines. While it is submitted that such an instruction was doubtful as a legal proposition, and under the state of the pleadings, as above contended, was not in any sense competent, relevant, or material, it will not be

urged, because of the more conspicuous and clearly defined errors comprehended within the remainder of the instruction given.

The next subject of the instruction of the court was that whatever cutting was done under the defendant's authority was presumed to have been done in furtherance of the objects permitted by the act of June 8, 1872, and in accordance with the terms of said act and not in violation of it. This proposition is so remarkable in its character as to challenge the attention of the most casual observer. From what source could such a presumption be drawn? Upon what theory could it be based? Such instruction is directly contrary to the opinion of this court in the case of the *Northern Pacific Railway* v. *Lewis*, which will hereafter be commented upon in considering the question of burden of proof, and contrary to the general principle stated by elementary writers, and almost, if not quite, always adhered to in similar cases. It would seem to be a very rash departure from such rules as well as the common sense of the situation, and it is difficult to understand how a court could be led by the persuasion of counsel to submit such a direction to a jury.

But this part of the charge is immediately followed by a statement of the burden of proof in the case: That it was upon the plaintiff to establish by a preponderance of the evidence that the timber taken was for some purpose or at some place not contemplated by the act of Congress, and inasmuch as the plaintiff had offered no evidence upon these points, the jury was instructed to find for the defendant. There is no equivocation or

implied reservation in this charge. It is stated in as plain and bold terms as the learned counsel for the defendant could well have used for the purpose, and consists of the invasion of settled principles long established upon a sound and practical basis of reasoning. A thorough discussion of this matter will follow under another of the assignments of error, where authorities will be quoted and discussed. But it is contended on the part of the plaintiff in error that the whole of this charge, approved, as it was, by the supreme court of the Territory, in addition to being in line with and pursuant to a defense impossible under the pleadings in the case, was error in general and in detail.

SECOND.

The court erred in holding defendant's plea sufficient to admit of a special statutory defense.

It is nowhere contended that the defendant was not guilty of the appropriation and use of the property. The plea was "not guilty"—that and nothing more. The defense sought to be made was by virtue of a private act containing a grant to defendants as a corporation. The whole nature of the defense required a special plea. At common law it would have been so. Under the common-law practice, as modified by statute in many States, it would have required a special notice under the plea of "not guilty."

Chitty lays down the following doctrine (vol. 1, p. 655):

> In *trover*, as in assumpsit, all matters of confession and avoidance must be pleaded

specially, so that where there has been a conversion in fact and the defendant insists that such conversion was lawful, without denying the plaintiff's possession, he must plead specially the right or title by virtue of which he was justified in the commission. (Chitty on Pl., vol. 1, p. 655.)

And as to pure trespass the same author has this to say:

An excuse of the trespass, as on account of a defect of fences, which the plaintiff was bound to repair, or a license from the plaintiff, * * * or in respect of any easement, or incorporeal right, as common of fishery, or of pasture, or of turbary, and as right of way, either public or private, and whether by grant, will, prescription, custom, or of necessity, must always have been and of course still must be specially pleaded.

A justification of the trespass in respect of any claim by custom, prescription, or grant, to any right of common or other profit from or upon land, or to any way or other easement, or to any water course, or to the use of any water, must be pleaded. * * * License from the plaintiff must be specially pleaded (p. 655).

Stephen, in his work on Pleading, paragraph 347, uses the following language:

It is not necessary to set forth a public statute. The case, however, of private acts of Parliament is different, for these the court does not officially notice; and therefore where a party has occasion to rely on an act of this description he must set forth such parts of it as are material. (Stephen on Pl., par. 347.)

From the Encyclopedia of Pleading and Practice, volume 1, 845, we quote the following:

> Matters in justification of an act which would otherwise be unlawful must be specially pleaded.

The conversion of timber unlawfully cut, or lumber from timber unlawfully cut, as in this case, could only be justified under a special plea.

Again, from the same work, volume 1, page 848, we quote:

> The defense of leave and license must be specially pleaded.

Leave and license was the defense in this case.

In the famous case of *Young* v. *Cooper* (6 Exch. Rep., 259), the court makes use of the following language:

> At common law, in all actions on the case the plea of not guilty operated only as a denial of the breach of duty or wrongful act alleged to have been committed by the defendant and no other defense than such denial was admissible under the plea. Matters of confession and avoidance in *trover* must be specialty pleaded.

Federal decisions clearly in line with our contention are not wanting. In the case of *Mack et al.* v. *Lancashire Ins. Co.* (1 Fed. Rep., 193), the court, in construing the statute of Missouri relating to the answer of the defendant amendatory of the common-law forms of pleading, which reads in part as follows:

> The answer of the defendant shall contain, first, a general or specific denial of each material allegation of the petition controverted by the defendant, or any knowledge or information

> thereof sufficient to form a belief; second, a statement of any *new matter* constituting a defense or counterclaim, in ordinary and concise language, without repetition,

said:

> The State statute of 1875 permits, instead of a specific denial as to each of the allegations, a general denial; but it does not, and I wish this distinction understood as the rule of the court, it does not permit, under a general denial, affirmative matters of defense to be set up. * * * The statute, as I interpret it, is this: You may put in a general denial as to each allegation on which the plaintiff's right of recovery depends, instead of putting, as heretofore, a specific denial of each *seriatim;* but when you come to affirmative matters you must then specify each matter of defense according to the rules of pleading pertaining thereto.

The object of that statute, as of the statute of New Mexico, is to simplify and abbreviate pleadings. In the Missouri statute this idea is conveyed by the general language of it, whereas in the New Mexico statute the forms are given by way of illustration. But both statutes have the same objects in view and are identical in substance and effect.

In *Walker* v. *Flint* (11 Fed. Rep., p. 31, Mo.) the court, at page 33, say:

> The uniform ruling of this court has been that a general denial under the code is not equivalent to a general issue at the common law, whereby certain affirmative or quasi-affirmative

> matters can be heard. * * * If the defendant has an affirmative defense in the nature of an avoidance, he must plead it.

State courts have, in a large number of instances, dealt with the same question in the same general manner and to the same effect.

> In an action to recover damages for the pollution of a stream, the defense of justification *by virtue of a statute* must be specially pleaded. (*Kellogg* v. *New Britain*, 62 Conn., 233.)
>
> All matters justifying a trespass on land must be specially pleaded.
>
> *Lentz* v. *Victor*, 17 Cal., 272;
> *Pico* v. *Colimas*, 32 Cal., 578;
> *Alferd* v. *Barnum*, 45 Cal., 482;
> *Carter* v. *Wallace*, 2 Tex., 206;
> *Klais* v. *Pulford*, 36 Wis., 587.
>
> A license to enter upon land for any purpose must be specially pleaded.
>
> *Snowden* v. *Wilas*, 19 Ind., 11;
> *Chase* v. *Long*, 44 Ind., 427.
>
> Under the code of New York, in an action to recover damages for injuries received by plaintiff in consequence of falling through a coal hole in the sidewalk, the defense of license to construct the hole must be specially pleaded, and it must be alleged that the terms of the license were complied with. (*Clifford* v. *Dam*, 81 N. Y., 53.)

In assigning error upon this point in this brief we have quoted this statute of New Mexico relative to pleadings and governing in this case. Let us now carefully examine the same:

The fifty-third paragraph gives a short form of a denial of the wrong alleged, namely, "Not guilty." That was the plea adopted by the defendant herein.

The fifty-fourth paragraph is intended as a short form of plea in confession and avoidance.

The fifty-seventh paragraph suggests a somewhat more lengthy explanation of the nature of the defense.

Returning to section 1, it will be seen that after all it was intended by the statute that these forms should be used with such modifications as may be necessary to meet the facts of the case. We contend that this language expressly limits the scope of the act, and that it was not intended or expected by the legislature to excuse a party in pleading from so modifying the forms suggested as to apprise the plaintiff in some manner when a special statutory defense should be made. Take No. 54, for instance: We say that in view of the general rules of pleading applicable to such defense as the appellees here made in the trial court that in order to fulfill the intendment and spirit of the act the plea should have been something like this:

> That he did what is complained of by plaintiff's leave, as granted defendant by the act of Congress of June 8, 1872, as amended by the act of March 3, 1877.

(It will be observed that a mistake is made in the statute in the use of the word "defendant's," which should, of course, read "plaintiff's.")

In other words, we claim that it was not at all expected that the legislature in passing this act intended

to do otherwise than merely simplify and abbreviate pleading, and that it was especially not expected or provided that the suggestions or forms of pleas set out should serve to admit in evidence a defense totally different from that indicated in the plea made use of.

THIRD.

The court erred in holding the burden of proof was upon the plaintiff to show that the timber was used for purposes not contemplated by the act.

The use to which the timber involved in this case was put is matter peculiarly within the knowledge of the defendant company, which is defendant in error here. To compel the Government to prove that the timber was not used for purposes contemplated by the act would, in effect, be to enforce proof of a negative. Out of its own mouth the supreme court of Mexico stands condemned of error. In *United States* v. *Gumm et al.*, decided in August, 1889, by that court, reported in 58 Pac. Rep., 401, the action was trover, as here. The defense was license under the act of June 3, 1878. In this case license of the same general character is involved. The judges of the court were the same judges who unanimously decided this case, and the court was unanimous in the Gumm case. We quote from the opinion:

> The burden of proof was upon the plaintiff to establish, by a preponderance of the evidence, the cutting and conversion of the timber by the defendants, or some of them, from the public lands, but the burden of proof was undoubtedly

> upon the defense to show the right to so cut and dispose of such timber. This right is designated as a license in this case and the defense recognized the necessity of showing the right by pleading license. Having pleaded license to cut and dispose of such timber the burden of proof was upon the party pleading license as a defense to maintain the plea and thus excuse the act. It should be so for the further reason that some of the facts constituting this defense are within the knowledge of the defense only, and therefore the plea can not be maintained without their disclosure by the defendants.

One of two conclusions must necessarily be arrived at after a reading of that case, viz, that the court, in this case, intended to reverse its ruling in the Gumm case, without apology or explanation and in no uncertain way, or else they hold a private individual to one rule of conduct and applied a directly opposite rule to a quasi-public corporation.

In this work on Evidence, Mr. Starkie, at paragraph 509, says:

> It is a general rule that the *onus probandi* lies upon the party who seeks to support his case by a particular fact, of which he is supposed to be cognizant.

In *Commissioners* v. *Towle*, (138 Mass., 490), where one being indicted for illegally selling liquors on the Lord's Day, justified under a license to sell liquor to guests of his hotel, it was held that there being no evidence adduced by the defendant that the purchasers were guests, he was properly convicted.

Stone v. *United States*, 64 Fed. Rep., 667 (C. C. A.), was an action brought by the United States to recover value of timber cut upon public lands. Defendant claimed he purchased the timber from settlers on such lands under preemption and homestead laws, and the court held the burden to be on him to show the good faith of such settlers and their right to cut and sell such timber under the statutes.

Selma, Rome and Dalton Ry. Co. v. *United States* (1891), 139 U. S., 560, was an action brought in the Court of Claims for carriage of mails prior to the rebellion. The claim was based upon the act of March 3, 1877. That act appropriated money for payment of mail services performed prior to the rebellion, provided that such claims as have been paid by the Confederate government under its act of August 30, 1861, shall not be again paid. The question was whether the claimant should prove he had not been paid by the Confederate government, or the United States that he had. The court held, even though it was negative matter, that the claimant must bring himself within the terms of the act, or he made no case. Said the court, speaking through Mr. Justice Harlan:

> The act of 1877 was, in effect, an invitation to all having claims of the class described in it, which had not been paid by the Confederate States, to present them for payment out of the sum appropriated by it for that purpose, leaving those seeking the benefit of the act to show that their claims were of that class. Besides, as the fact of payment or nonpayment by the

Confederate government was peculiarly within the knowledge of the claimant, or within his power—if the power is in anyone—to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the act of 1877 provided. But there was no proof on the subject by the plaintiff, nor does it appear, if that fact were material, that such proof was impossible. It prepared the case and went to a hearing upon the theory that it was entitled to judgment, upon proof *simply of the services rendered*, unless the United States showed that the claim in suit had been in fact paid by the Confederate government. We can not accept that interpretation. * * *

"From the very nature of the question in dispute," says Mr. Best, "all, or nearly all, the evidence that could be adduced respecting it must be in the possession of, or easily attainable by, one of the contending parties, who accordingly could at once put an end to the litigation by producing that evidence; while requiring his adversary to establish his case, because the affirmative lay on him, or because there was a presumption of law against him, would, if not amounting to injustice, at least be productive of expense and delay. In order to prevent this, it has been established as a general rule of evidence that the burden of proof lies on the person who wishes to support his case by a particular fact which lies more peculiarly within his knowledge, or of which he is supposed to be cognizant."

In *United States* v. *Cook* (19 Wall., 591) this court held that where timber was cut upon public lands occupied by Indians, the purchaser of such timber, when sued for the value of it, must show the right of the Indians to take the timber in order to maintain his title.

And the doctrine of the Cook case was reaffirmed by this court in the case of the *Northern Pacific Railway Company* v. *Lewis*, 162 U. S., 366 (1895). This was an action by Lewis against the railroad company for cord wood which had been destroyed by sparks from an engine of the defendant company. The title of Lewis to the timber was assailed, and he claimed the right to the timber under the act of June 3, 1878, he having cut some himself and bought some from others who claimed the right under the same act. We rely almost entirely upon the holding of this court in this case as to the question of burden of proof.

The decision of the lower courts in the case at bar was in direct contravention of the holding of this court in the Lewis case. The cases are almost entirely similar in principle, and while the entire opinion in the Lewis case is filled with language serving to show how erroneous the decisions of the lower courts were in the case at bar, we venture to make only two quotations therefrom, inviting the attention of the court, however, to the case generally:

> The right to cut is exceptional and quite narrow and for specified purposes only. The broad general rule is against the right. If the plaintiffs had acquired the right by reason of a com-

pliance with the provisions of the statute, the facts should have been shown by them. The presumption in the absence of evidence is that the cutting is illegal (p. 376).

As the Government was the sole and absolute owner of these lands and of the timber growing thereon, the presumption would be against the right of any third person to cut the timber, and if he claimed the right by virtue of any authority or license given him by the owner, that is, the Government, he would be compelled to show it. *There was no evidence given on this subject by either party, and hence the plaintiffs did not satisfy the burden of proof which rested upon them in this behalf* (p. 377).

(Italics are ours.)

For the reasons above stated it is believed that the judgment of the supreme court of New Mexico should be reversed.

Respectfully submitted.

MARSDEN C. BURCH,
Special Assistant to the Attorney-General.

ERRATA

In the Printed Record.

In examining the printed record for the preparation of the brief for defendant in error, we discovered an error in a material date in, and a serious omission of important words from, defendant's "Exhibit C" (fol. 24-6), as reproduced in the printed record. From this "Exhibit C," as it appears in the printed record, there is omitted immediately after the words "telegraph lines" in line 6 of said exhibit, the following words: "and also for the repair of that portion of its railway and telegraph line."

The first paragraph of said "Exhibit C" should read as follows:

> "Whereas, by certain Acts of Congress of the United States, The Denver & Rio Grande Railroad Company, in its own right, and as the successor of The Denver & Rio Grande Railway Company, is authorized to take from the public lands adjacent to its line of railway, stone, timber, earth, water and other material required for construction of its railway and telegraph line; *and also for the repair of that portion of its railway and telegraph lines* constructed prior to the 8th day of June, 1882."

In line 10 of the same exhibit, we find "1883," an erroneous date, which correctly is, and should appear as, "1882."

We are not yet aware whether these errors crept in at the preparation of the transcript of the record by the clerk of the New Mexico Supreme Court, or whether they are—as they might easily be, owing to the appearance of the same words "telegraph line" in two places—an oversight by the compositor in setting up the printed transcript. We have put ourselves in communication with the clerk of the New Mexico Supreme Court, and also with the clerk of this Honorable Court for the purpose of ascertaining where these errors were made, and of having them properly corrected; and we have no doubt but that, by the time the case is reached for final hearing before this Honorable Court, the record will be corrected so as to accurately present defendant's "Exhibit C," as introduced in evidence at the trial, and as of record with the files in this cause.

Meanwhile we take this method—the only one now open to us—of calling the Court's attention to these errors in the printed record, since they in an important degree directly affect the subject of the action herein.

IN THE

SUPREME COURT

OF THE

UNITED STATES

October Term, 1902.

THE UNITED STATES, *Plaintiff in Error,* v. THE DENVER AND RIO GRANDE RAILROAD COMPANY, *Defendant in Error.*	*Error to the Supreme Court of New Mexico.*

BRIEF FOR DEFENDANT IN ERROR.

The condition of the printed record here (which we assume to be an exact reproduction of the original record on file with the Clerk of this Court) leaves us at somewhat a disadvantage in preparing the printed argument for defendant in error. It affords us no direct or certain information or suggestion as what are the errors upon

* [Wherever italics are used in this brief they may be considered our own unless otherwise stated.]

which the plaintiff in error relies for a reversal of the judgment herein, or what points and contentions will be urged before this Honorable Court in support of this writ of error. The printed record *does not contain* any *assignment of errors* as required by Sec. 997 of the U. S. Rev. Stat., and we have not yet received, and presumably will not receive in time to make printed answer thereto, the brief for plaintiff in error so as to enable us to ascertain whether it contains a *statement of errors*, as provided for in Rule 21 of this Court, and to be informed thereby what errors will be assigned and what contentions made in support of this writ.

The situation is further obscured by the fact that the record before us does not show any *exception to the judgment* of the New Mexico Supreme Court, nor any *prayer for the reversal* of that judgment, nor any *petition for a writ of error* herein.

These irregularities, omissions and defects of the record are of such character that, it seems to us, it does not sufficiently present a case for review, and does not require this Court to give the case any consideration other than to dismiss the writ and affirm the judgment. There is, furthermore, to our minds, a serious doubt whether a record, disclosing the absence of such fundamental essentials to review, presents such a case as will, under the rules of appellate procedure, permit or authorize the consideration of this writ of error upon the merits by this Honorable Court, even if it should be inclined to overlook the omission of these essentials and examine the case to ascertain

for itself whether there are any such errors therein as demand a reversal of this case.

However, as we read Rule 21 and the decisions of this Honorable Court which have come under our notice construing said rule, it seemed to us exceedingly doubtful whether a motion to dismiss would be proper and available, inasmuch as this Court is vested with so broad a discretion in giving consideration to cases presented to it, notwithstanding radical defects and omissions in the procedure by which the particular case is brought up.

We have, therefore, concluded that a proper course here—and perhaps the only proper course—would be to refrain from filing a motion to dismiss and, after calling the Court's attention to the foregoing facts, to leave the question of the regularity and sufficiency of the proceedings incident to perfecting this writ of error for such consideration and determination at the final hearing as this Honorable Court may deem meet and proper in the premises.

Under this condition of the record, we, in the preparation of our printed argument for the defendant in error, are placed in a position where we must *guess* at the points which will be raised and the contentions which will be made in support of this writ of error, and are, therefore, under the necessity of being guided solely by the contentions made in the New Mexico courts, and compelled to discuss all of those contentions, although we believe that many of them will not be urged before this Honorable Court, and that if we had before us an assignment of errors as required by said Sec-

tion 997 of the U. S. R. Stat., and by Rule 21 of this Court, our argument on behalf of the defendant in error might be very much abbreviated and many of the points, which we are now compelled to consider and discuss, eliminated.

Taking then as our guide, for want of a better one, the assignment of errors upon which this case went up from the *nisi prius* court to the Territorial Supreme Court, the first question raised, and, as we understand it, the one most relied upon, by the plaintiff in error in the New Mexico Supreme Court, is the following:—

I.

Is the Act of June 8, 1872, Void for Uncertainty?

In answer to this, defendant in error relies upon the following propositions, to wit:

(1) *This point is one which is no longer open for discussion.*

This statute (17 U. S. Stats. at Large, p. 339) has been repeatedly before the various federal courts from the Supreme Court down to the district courts in cases between the *same parties*, predicated upon the *same cause of action* although in some instances *the subject of the action* in the particular cases, while similar, has been not identical with that here involved. The statute has in all of those cases been considered and adjudged to be a "solemn grant" *inter partes* for valuable consideration. It has been so considered and acted upon by each of these parties, as well by the United States as by this defendant in error; by the courts,

federal and territorial, the Department of the Interior throughout all of its subdivisions having any control over or connection with the question, by the state and territorial courts, and by this railroad company, its officers, agents, and representatives, from 1872 down to September 14, 1900, without any contention, suggestion or intimation that said statute was in this, or any other particular, invalid, void or inoperative.

U. S. v. *D. & R. G. R. Co.*, 150 U. S., 1;
Bacheldor v. *U. S.*, 83 Fed., 986;
D. & R. G. R. Co. v. *U. S.*, 34 Fed., 838;
U. S. v. *D. & R. G. R. Co.*, 31 Fed., 889;
D. & R. G. R. Co. v. *U. S.*, 9 N. M., 385;
In re., Denver &c. R. Co., 8 L. D., 41, 42.

We, therefore, confidently contend that the plaintiff in error is now and has long since been completely precluded from raising any such point, or making any such contention.

(2) *The word* "adjacent," ***as used in these statutes, is not, in a legal sense, ambiguous or uncertain so as to affect the validity or sufficiency of this statute.***

The meaning and application of the word as used in this and kindred statutes has been before the courts in numerous cases and its meaning and application made the subject of judicial consideration and determination. In none of these cases has any difficulty been experienced by the courts in determining the reasonable, proper and effective meaning of the word as applied to each par-

ticular case; in giving it such an interpretation as to make the statute operative and to carry out the evident intention of Congress in passing it; and in so applying it as to give the railroad company the intended benefit and at the same time fully protect the rights and property of the United States against unreasonable and unwarranted invasion. In fact the courts have promptly and clearly recognized that Congress intentionally and intelligently selected and used the term "adjacent," in preference to words of kindred meaning, for the very purpose of giving to the statute a certain amount of elasticity so that the railroad company might thereunder receive the benefit intended to be given in return for the immense benefit conferred upon the Government, its theretofore unavailable and inaccessible public domain and resources, and upon the public at large. It has been repeatedly held by the federal courts that Congress intentionally and intelligently selected and used this particular term for the very purpose of avoiding an arbitrary, cast-iron and inflexible limitation of the rights granted by the statute and in order that, in applying it to concrete cases which might arise, such interpretation and application of it might be made as was fair, reasonable and just under the circumstances of each particular case.

In *Bacheldor* v. *United States*, 83 Fed., 987, the U. S. Cir. Ct. App. (8th Cir.), in construing the Act here under consideration, said:

> "The sole question to be considered upon this record is the meaning of the

word "adjacent" as used in the Act of Congress of June 8, 1872. * * * If Congress had intended to limit the defendant's right to take timber and other materials, for the construction of its road, to the township through which its road is located, it would most likely have so declared in plain language and thus have freed the act from all doubt and uncertainty as to its meaning. The fact that Congress did not do so when conferring the right in question, but used the word "adjacent," which is purely a relative term, and may be applied differently when applied to different objects and under different circumstances, is very persuasive evidence that Congress did not intend to fix an arbitrary line on each side of the defendant's right of way, beyond which the right to take timber and other materials should not extend. The use of the phrase "lands adjacent" to the right of way, instead of fixing a more precise limit, as might well have been done by referring to the public surveys, indicates, we think, that it was not the intention of Congress to confine the privilege in question to particular townships or sections lying along the right of way, but that its purpose was to leave the right to take timber and other materials to be governed by circumstances. Congress intended to offer substantial inducements for the con-

struction of railroads in certain sections of the country where timber suitable for railroad construction was known to be scarce, and in many places distant from the lines of railroad to be benefited, as they would be projected and built. For that reason it did not establish a fixed line on either side of the right of way, which, if established, would at times render the privilege of taking material valueless; but it chose to confer the privilege in such terms as would allow the Land Department, and courts and juries as well, some discretion in determining, under different conditions, what was a proper limit within which it might be exercised. It accordingly authorized timber and other materials to be taken from adjacent lands, leaving those whose duty it would be to see that the right was not abused, but was exercised in a reasonable manner, to decide in any given case whether the land, from which material had been obtained, was adjacent to the right of way within the spirit and intent of the Act. * * * * *
The use of the word "adjacent" is of much significance, and renders it necessary in all cases to consider, in the first instance, whether the land from which timber has been obtained for the construction of a railroad is near to or remote from the right of way."

See, also, the other cases cited *supra*.

The word, "adjacent," has been also under consideration and interpreted in many other federal, and some state, cases, where it appeared in similar connections, and in arriving at the proper interpretation and effect to be given this word and the proper construction of a statute containing it, it may be interesting and instructive to examine some of the rulings and adjudications upon similar statutes in which the word appears:

Vane v. *Newcomb*, 132 U. S., 220, 235-6;
U. S. v. *Freeman*, 3 How., 556, 564-5;
23 Am. and Eng. Ency. of Law (1st ed.), 314-15.

With this in view, we respectfully call attention to the following:

Winona, &c., R. Co. v. *Barney*, 113 U. S., 618, 625;
U. S. v. *St. Anthony R. Co.*, 114 Fed., 722;
Stone v. *U. S.*, 64 Fed., 667, 673-4;
Same v. *Same*, 167 U. S., 178, 189-198;
2 Copps Land Owner, 820;
10 id., 11, Sec. 2;
Ib., p. 139, Sec. 30;
In re G. B. & L. R. Co., 1 L. D., 610;
In re Denver &c. R. Co., 8 L. D., 41, 42, 44;
Also, *Henderson* v. *Long*, 3 Tenn. (Cooke), 128;
U. S. v. *Burlington &c. R. Co.*, 98 U. S., 334, 339, 340;
Peverelly v. *People*, 3 Parker's Cr. Rep. (N. Y.), 69;
Johnson v. *D. C.*, 6 Mackey, 21.

In *U. S.* v. *N. Pac. R. R. Co.*, 29 Alb. L. J. (p. 24), Hoyt, J., said:

> "Congress then having selected from several synonymous words the one having, as applied to the subject in the section in which it is used, the broadest meaning and most extended signification of the whole, must be held to have intended the broadest rather than the more restricted signification to be given to it in the interpretation of said section. * * * And we are of opinion that timber land nearest to the line of the road must be held to be neighboring timber land, even although there may intervene large tracts of land not timbered. If this be so, then, under the facts of these cases, as above stated, the lands from which the timber in question was cut were in the neighborhood of the line of the road where it was used, and, therefore, *adjacent* thereto, within the meaning of Section 2 of the charter of the defendant Northern Pacific Railroad Company."
>
> 1 *Am. & Eng. Enc. of Law* (2d ed.), 634, note.

In *U. S.* v. *Chaplin*, 31 Fed., 890, speaking upon this point, Deady, J., said:

> "Before undertaking to interpret the language of the act in this connection, it is proper to consider its general nature and purpose. And, first, the act is not a

> mere gratuity, but was evidently passed on the theory that it is for the interest of the grantor to promote the building of railways through the public domain. At its passage, the United States was, and still is, the owner of millions of acres of wild and unsettled land. Congress intended to enhance the value and promote the settlement of these lands by inducing capital to build railways through them. The inducement is the right-of-way and the license to take material from the adjacent lands for the construction of the road. * * * What is 'adjacent' land, within the meaning of the statute, must depend upon the circumstances of each particular case."

In *U. S.* v. *Lynde*, 47 Fed., 297, we find Knowles, J., after commenting upon kindred decisions, saying:

> "Considering these cases, it is evident that the adjacent land named in the charter of the Northern Pacific Railroad Company, was not intended to be land contiguous to or adjoining the line of its railroad. And it seems to be left in some doubt as to what should be considered adjacent or neighboring land to said line of said railroad. It certainly is not definitely determined. We are led to the conclusion that it must be determined by the evidence in the case."

We say, therefore, that even viewing the question on one hand as an original proposition, it can not be said that this word "adjacent" is in a legal sense ambiguous and uncertain so as to render void and ineffectual a statute in which it appears and whose sufficiency and validity depends upon it.

On the other hand, whatever might be the holding of the court upon the question, if it were now presented for the first time, this word has been so repeatedly before the courts and its meaning and application so thoroughly construed and judicially defined that it can not now be said to be ambiguous and uncertain, even if it were possible to hold that such defects inhered in the word as originally used and before its application and meaning were defined, limited and fixed by judicial and departmental interpretation, as appears by the authorities already cited.

We respectfully submit that all question as to the validity of this Act of Congress and the sufficiency of the word, "adjacent," as used therein, is, as between the parties hereto, now and forever concluded by operation of the rule of *stare decisis* as well as of the principle of *res judicata*.

In *II Black on Judgments* (1891), § 603, p. 720, it is said:

> "According to the doctrine of the best cases, a title previously passed upon, although in a suit between different parties, will not be again examined and adjudicated in a case proceeding upon the same

state of facts and presenting precisely the same question, in the absence of a showing that the former decision was manifestly erroneous. This, however, is not strictly upon the ground that the matter is *res judicata* but rather upon those settled principles which induce the courts to abide by their former decisions, that is, the rule of *stare decisis*."

See, also—

Coffey v. *U. S.*, 116 U. S., 436, 443;
Stone v. *U. S.*, 64 Fed., 667, 670–2;
Empire St. N. Co. v. *Am. S. L. Co.*, 74 Fed., 864, 868;
Bradley Mfg. Co. v. *Eagle Mfg. Co.*, 58 Fed., 721, 722.

(3) *Admissions by the plaintiff in Error.*

The validity of this statute and the sufficiency of the word "adjacent" as used therein has been so repeatedly, expressly admitted by and on behalf of the United States in controversies before the Interior Department and in actions and suits before the courts arising and prosecuted between the identical parties to the present case upon the same cause of action although differing in some cases as to the subject-matter involved, that it is now too late for the plaintiff in error to raise any such contention. By its expressed admissions heretofore, it is now estopped to deny the validity and sufficiency of this grant because of the supposed defect now urged for the first time, aft more than twenty-eight years recognition and ad-

mission of the sufficiency of this word, "adjacent," and the validity and operativeness of the statute, during which period the defendant in error relying thereon has been induced to perform all the conditions and made good all the considerations, by it to be performed and made, so as to secure to it the valuable and to it absolutely essential benefits solemnly granted in 1872 when the vast public domain, which has since been opened up and made valuable by reason of its railroad construction and operation, was practically as inaccessible and valueless to the nation and to the people generally as the reputed gold-fields in the Antartic circle.

For such admissions see, *U. S.* v. *Denver &c. R. Co.*, 150 U. S., 1, and other cases cited *supra*, at page 5; especially *Denver &c. R. Co.* v. *U. S.*, 9 N. M., 382, 388, where the fact of such admission appears in *the very case at bar*.

(4) *The Law of the Case.*

The case is here for review of a judgment of the Supreme Court of the Territory of New Mexico, made upon *a second* writ of error. We submit that the only matters which can be considered by this Honorable Court are those matters *which were before the Territorial Supreme Court on this second review*, and which were then determined by it. This court must consider the case exactly as it was presented to the New Mexico Supreme Court, and any proper and legal limitation which inhered in the case as presented to the Territorial Court upon this second writ of error still inheres in it before this Honorable Court, and

limits the scope of the review which can be now made of the judgment of the Territorial Supreme Court. The first judgment in this case was entered by the district court for the first judicial district of the Territory of New Mexico in January, 1897; that judgment was reviewed upon writ of error by the Supreme Court of New Mexico, and on August 23, 1898, the judgment was reversed and the case sent back for a new trial. (*D. & R. G. R. R. Co.* v. *The United States*, 9 New Mexico, 382). Upon the first trial in the district court and the first review in the Territorial Supreme Court, the validity and sufficiency of the Act of June 8, 1872, was conceded and admitted (9, N. M., 388) and said Supreme Court expressly held (p. 385):

> "The Railroad Company had a right, under the Acts of Congress above referred to, to cut such timber from the public lands adjacent to its line * * * * * The Act of Congress gave it such right. The right is not a mere license; it is more. It is a solemn grant given by a special Act of Congress."

Upon the first trial and review in this case the contention which we are now discussing *might have been raised* and urged with as much propriety as upon the second trial and review. The statute was then involved, and if it was for any reason invalid and void, the defendant was absolutely without right or defense in the premises, and the decision reached on the first review could not have been made. The question existed then in

the same condition and with the same controlling effect as afterwards. If there was anything in the point, there was no reason why it should not be presented upon the first trial and review; and if it had been presented and held to be good, it was a complete answer to the defense relied upon by the railroad company. This statute was necessarily involved in that trial and review, and the decision reached upon the first review could not have been reached except upon the finding that this statute was good and valid. If, therefore, the first review decided anything; if the decision of the Supreme Court of New Mexico upon the first writ of error is not mere waste paper; then it settled for all purposes in this particular case that said Act is valid, and constituted a solemn grant by Congress to the railroad company.

In *II Black on Judgments* (1891), the law is stated as follows:

§ 613, p. 736.

> "Necessary and inevitable inferences—facts without which the judgment could not have been rendered—are equally covered by the estoppel as if they were specifically found in so many words. 'The estoppel is not confined to the judgment,' says the Supreme Court of Massachusetts, 'but extends to all steps involved in it as necessary steps or the ground work upon which it must have been founded. It is allowable to reason back from a judgment to the basis upon which it stands, upon the

obvious principle that, where a conclusion is indisputable, and could have been drawn only from certain premises, the premises are equally indisputable with the conclusion."

§ 614, p. 740.

"It is not necessary to the conclusiveness of the former judgment that issue should have been taken upon the precise point which it is proposed to controvert in the collateral action. It is sufficient if that point was essential to the former judgment."

§ 615, p. 741.

"A judgment is conclusive by way of estoppel only as to facts without the existence and proof or admission of which it could not have been rendered. In other words, it is conclusive evidence of whatever it was necessary for the jury to have found in order to warrant the verdict in the former action, and no further."

§ 657, p. 791.

"But the trial of an action of trespass may turn upon the question of title, and if either of the parties puts his title in issue and it is tried and passed upon, the verdict and judgment in that suit will be conclusive evidence in favor of (or against) such title, at least in a subsequent action of trespass."

In *Smith* v. *Ontario*, 4 Fed., 386, the Court said (p. 390):

> "The doctrine of the estoppel becomes of very little practical value, if whenever a former adjudication is relied on the former can be distinguished from the second by some variation of the evidence. The matter at issue or point in controversy may involve a number of minor issues, and it can not be said not to have been decided because some of these minor issues were not specifically considered.

In *Semple* v. *The Bank*, 5 Sawyer, 88, the court said (p. 96):

> "But the court, even if there had been no defense interposed, must, in giving its decree, have determined that the bank had capacity to sue and that the note and mortgage were valid. This much at least was necessarily included in the decree, and without determining these two questions in this way the court could not have pronounced it.
>
> It is not necessary to say that the Circuit Court as a matter of fact actually and consciously passed upon these questions in the light and upon the grounds which they are now presented to this court. On the contrary it may be admitted that it did not, because the point—that in taking this note and mortgage the bank was a foreign corporation not authorized to

> transact business in this State—was not presented to it. But in contemplation of law the court, in determining these questions in favor of the plaintiff therein, did so as to any and all matters which the defendant *might* have alleged in objection thereto."

The principle is well expressed in *McKinney* v. *The State*, 117 Ind., 26, 28:

> "In order that there may be an end to litigation, questions which were open to dispute and were either expressly or by necessary implication decided on the first appeal of a cause will not be open for review on a second appeal, upon which only so much of the proceedings as are found to have taken place after the order remanding the cause will be considered. What precedes the mandate will be regarded as finally disposed of and no longer the subject of debate in any of the subsequent stages of the trial. (Citations.)"

And in *Forgerson* v. *Smith*, 104 Ind., 246, the principle was again formulated, in the following language (p. 247):

> "Where the questions are necessarily involved, and where the conclusion declared could not have been reached without either expressly or impliedly deciding such questions, the judgment on appeal reaches the case throughout all its subsequent stages."

See, also—

Davis v. *McCorkle*, 14 Bush (Ky.), 746, 751;
Stewart v. *Heiskel*, 86 Va., 191, 193;
Joslin v. *Cowee*, 56 N. Y., 626.

The fact that the plaintiff in error and its able and distinguished counsel did not then insist upon the invalidity and insufficiency of this statute does not in the slightest degree alter the effect of the decision upon the first writ of error. They might have raised the point then, and if they did not, they were forever precluded in this particular case, because the decision then reached was necessarily predicated upon the validity of this statute and could not have been reached or justified upon any other theory. Under such a condition of the case, the decision upon the first appeal became *the law of the case* in all future proceedings therein, and the plaintiff could never thereafter litigate in that case any question which was directly or necessarily determined in the first review. The United States and its learned counsel could not thereafter, by *a change of front*, urge a contention which was open to them upon the first trial and writ of error, and which was necessarily decided by that review.

I Van Fleet's Former Adj. (1895), § 673, p. 1316;
Bridendolph v. *Zeller*, 5 Md., 58, 65;
Ellis v. *St. Ins. Co.*, 68 Iowa, 578.

In which last case the Court said:

"Evidence which we held was wrongly excluded we are now asked virtually to hold was rightly excluded, and we are

asked to hold this, not by reason of any new fact which is put into the case, but by reason of a new legal position taken by the plaintiff's counsel. We are asked to virtually hold that the evidence was rightly excluded in contravention of our former ruling, because the plaintiff's counsel have devised a better argument for excluding it."

The Supreme Court of New Mexico itself was, upon the second writ of error, absolutely bound by the decision on the first review, and could not reopen or consider any question which was solemnly determined by it on the first review.

In *Batch* v. *Haas*, 73 Fed. 974, the U. S. Circuit Court of Appeals, 8th Circuit, said:

"It is a well-established doctrine, in the Federal Courts at least, that a second writ of error or a second appeal, in the same case, only brings up for review the proceedings of the trial court subsequent to the mandate, and that it does not authorize a reconsideration of any questions, either of law or fact, that were considered and determined on the first appeal or writ of error, provided the testimony on each trial was substantially the same. This doctrine results from the fact that the judgment rendered by an appellate court in a given case is conclusive upon the parties thereto, and that an appellate court, like a *nisi prius* court, is powerless to review or revise

its own judgments, after the lapse of the term at which they were rendered, except in cases of fraud. Another form of stating the doctrine is, that propositions of law which were considered and decided on the first appeal became the law of that particular case, and, whether right or wrong, must be adhered to on the second appeal. (Citations.)"

In *Thatcher* v. *Gottlieb*, 59 Fed., 872, the same court said (p. 873):

"The decision on the former hearing, as to the question of good faith, was, in fact, a decision that the facts reported in the former special finding would not warrant an inference of bad faith, and were insufficient in law to support such a finding. We are not disposed to recede from that position, nor could we do so, for the ruling formerly made has now become the law of the case, if the evidence on the first and last trials is substantially the same. (Citations.)"

In *Barney* v. *W. & St. P. R. Co.*, 117 U. S., 228, the U. S. Supreme Court says (p. 231):

"We recognize the rule that what was decided in a case pending before us on appeal is not open to reconsideration in the same case on a second appeal, upon similar facts. The first decision is the law of the case, and must control its disposition."

See, also—

Elliott's Appellate Procedure (1892), § 578, p. 491;
Bridge Co. v. *Stewart*, 3 How., 413;
Tyler v. *Magwire*, 17 Wall, 253, 284;
Supervisors v. *Kennicott*, 94 U. S., 498;
Clark v. *Reith*, 106 U. S., 464;
In re Sanford &c. Co., 106 U. S., 246, 255;
Last Chance M. Co. v. *Tyler*, 157 U. S., 683, 691–2;
City of Denver v. *Barber Asphalt Co.*, 83 Fed., 1020;
Austin v. *Hamilton Co.*, 76 Fed., 208, 211.

By the State courts of last resort, also, it is so generally accepted that the prior decision is conclusive on the same question on a subsequent appeal, that in a great majority of the cases the rule is adopted, without any discussion, and a prior decision in the same case is recognized as the controlling and unimpeachable "law of the case," and as more binding, when applicable, than the rule of *stare decisis*. Consequently, we find the state courts almost universally holding that a prior decision is conclusive upon a subsequent appeal, where the same questions are presented in regard to the same evidence, or where no material change was made in the evidence. The cases in which this proposition of law is announced and acted upon are too numerous to mention in the limited space to which we desire to confine this brief. If an exhaustive examination and comparison of such decisions is desired, many of them will be found collected in the note to *Hastings* v. *Foxworthy*, 34

L. R. A., 321. We shall content ourselves with reference to only three or four of such cases as examples of the trend of the decisions.

In *West* v. *Douglas*, 154 Ill., 164, the Court say (p. 166):

> "The rule is that a decision of a case by an appellate court on the merits is final on the matters decided, and is conclusive upon the facts upon a second appeal or writ of error in the same case. The points and questions considered and decided can not again be brought before such court for review, and can not be considered except upon petition for rehearing. (Citations.) * * * And in *Green* v. *City of Springfield*, 130 Ill., 315, it was held that, after a judgment of reversal by this court and a remanding order for further proceedings in conformity with the opinion, the parties will not be allowed to present the same objections or issues as before, although in a different form; and that only as to such questions as are substantially new will the case be open for further consideration."

See, also—

Stanton v. *French*, 91 Cal., 274, 276;
Larkin v. *Burlington &c. Co.*, 91 Ia., 654, 659;
Kratz v. *R. G. W. Ry. Co.*, 32 L. R. A., 828.

It consequently, necessarily and logically follows that, as this case comes up to this Honorable

Court solely for a review of the judgment which the New Mexico Supreme Court rendered upon the second writ of error this Court takes the case in exactly the same condition in which the Supreme Court of New Mexico took it upon the second review and, therefore, this Court, like the New Mexico Supreme Court, is precluded from opening up or considering any question which was not open to the New Mexico Supreme Court when it rendered the judgment which is now here for review.

What this Court can alone consider and determine is the correctness of the judgment of the New Mexico Supreme Court *upon the case as presented to it upon the second writ of error;* and if there is any question, no matter how well taken or controlling, which was not open to the New Mexico Supreme Court in the rendition of the present judgment, then that question is not open to this Court upon this review. If the decision of the New Mexico Supreme Court upon the first review was upon any question, "the law of the case" in that court upon the second review, then this Court is in like manner limited, bound and precluded. Otherwise, we would have a condition presented where this Court might review and reverse a judgment appealed from, although, in the conditions of law and fact under which the case was presented to the court below, *the judgment rendered was absolutely correct.*

Adams Express Co. v. *Hoeing*, 88 Ky., 373, 376;

Noonan v. *Orton*, 27 Wis., 300, 310.

The point, as it is in the case at bar presented by the plaintiff in error, has some apparent novelty, and seems at first blush more or less obscure and undetermined because few if any "white horse" precedents can be produced; but, when a brief analytical consideration is given to discover the underlying principle by which the question must be controlled, its appearance of novelty vanishes, and it is disclosed as the same old question, tho' in a new garb, which has been so often before the courts and always determined adversely to the present position of plaintiff in error.

II.

The Pleadings.

The next point upon which the plaintiff in error and its counsel made some contention in their printed brief in the court below was that the pleadings in this case were not sufficient to permit the defendant in error to rely upon the Acts of June 8th, 1872, and March 1st, 1877, or to introduce them in evidence, nor to authorize the territorial courts to consider them in this case. They contended that these Acts and certain other parts of the evidence were not admissible under the *general issue*, but that the defendant should have pleaded specially.

Our answer to this contention was and is threefold, to wit: (1) The pleadings in this case are to be controlled by, and were filed in accordance with, a special statute of the Territory of New Mexico which declares such pleadings "shall be sufficient;"

(2) The question of the sufficiency of the pleadings was so involved in the first review herein that it was concluded by the decision upon that review and was not a question which was open to the New Mexico Supreme Court upon the second review; therefore, it is not open for discussion or consideration upon the present writ of error; (3) Because irrespective of the special statute of New Mexico aforesaid, the answer of the defendant below was sufficient at common law to let in this evidence, and to authorize and require the courts to consider and give effect to said statutes.

(1) *The New Mexico Statute.*

By the Act of Feb. 7th, 1889, (Law of N. M., 1889, chap. 26), the New Mexico Legislative Assembly, provided, as follows:

(p. 45) "Section 1. The forms of pleadings which follow shall be sufficient in actions of law, and like forms may be used with such modifications as may be necessary to meet the facts of the case; * * *."

(p. 46) "*Commencements of Declarations.* A. B. by S. T., his attorney, sues C. D. (Here state cause of action.)"

* * * * *

(p. 49) "27th. That the defendant converted to his own use, * * * the plaintiff's goods, that is to say, etc."

* * * * *

(p. 51) *Commencement of Pleas.*

"37th. The defendant, by S. T., his attorney, says—(here state the substance of the plea)."

* * * * *

(p. 52) "53rd. That he is not guilty of the wrong alleged."

By reference to the declaration of the plaintiff and the answer of the defendant appearing in this record, (pp. 3. 5), it will be apparent that the plaintiff in error elected to model its declaration upon this statute, although, except for such statute, said declaration would have been wholly insufficient to tender any issue or present anything for trial herein. The plaintiff having chosen to proceed under the statute, the defendant, in drawing its answer, also pleaded in the form provided for in the same statute. As this statute solemnly enacted that the form of declaration adopted by the plaintiff below should *be sufficient*, the defendant could not attack it, although it afforded no definite information as to what was the precise case defendant would be required to meet, or what issues the plaintiff would present, or what evidence it would offer. By express provision of the statute the plaintiff under this declaration could raise any issue and introduce any evidence that could be introduced under any common law form of declaration in an action of trover and conversion. In like manner, the answer of the defendant being in the exact language which this statute declares should *be sufficient*, it was entitled to make

any defense and introduce any evidence which it could have made or introduced in any or all of the general or special common law pleas in such action. As this action was modelled upon and authorized by a special statute, the plaintiff in error is hardly in a position to insist that the common law rules of pleading in actions of trover and conversion have any applicability whatever.

If the plaintiff below had intended or desired that the pleadings in this action should be considered and controlled by common law rules, then it should have filed a common law declaration; for the statutory procedure was not exclusive. In that event the defendant would undoubtedly have modelled its plea in accordance with common law rules. The plaintiff below, having elected to proceed under the statute and in total disregard of the common law rules of pleading, cannot now be heard to complain that the defendant pleaded in accordance with the statute and did not model its defensive pleadings upon the common law forms of procedure in such cases. We say, therefore, that no attack can now be made upon the pleadings herein, because the defendant proceeded in that respect in strict accordance with the special statute of New Mexico, which guaranteed to it that a pleading in the form here adopted should be sufficient.

(2) *The form and sufficiency of the pleadings not an open question.*

The sufficiency of these pleadings was necessarily involved in the first trial and review, and their sufficiency was necessarily, although not ex-

pressly, settled by the former decision. (*D. &c. R. Co.* v. *U. S.*, 9 N. M., 382, 386.) As no contention was made upon the first trial and writ of error as to the insufficiency of these pleadings and no attempt made by the plaintiff in error to review that judgment of the New Mexico Supreme Court, the question was by the decision on that review concluded and eliminated from the case in all its future stages.

In *2 Van Fleet's Former Adjudication* (1895), 1321-2, we find the following:

> "§ 680. If the judgment rendered on appeal could not have been reached without deciding a question, that question remains settled during all subsequent stages of the proceedings. It is said in Kansas that the decision of the Supreme Court becomes 'the law of the case; and this rule embraces not merely all questions presented but also all questions necessarily involved in the decision.' Thus if the case is dismissed on the merits and on appeal reversed on the facts *without any discussion of the sufficiency of the petition, this bars any questions concerning its sufficiency on the second appeal.*"

In *Davis* v. *McCorkle*, 14 Bush (Ky), 746, on a first appeal the sufficiency of the petition was not attacked, but on the second appeal the defendant attacked its sufficiency *ab initio*. The Court said (p. 752-4):

"This Court, however, without adverting to the question of the sufficiency of the petition reversed the judgment and remanded the case with certain specific directions to the court below for 'further proceedings consistent with the opinion.'

* * * *

If the plaintiff's petition was defective as now contended it was not only unnecessary but improper to consider these questions of fact, or to reverse the judgment.

* * * *

If the petition showed on its face that no cause of action existed that was an objection which presented itself directly in the way as a reason why the plaintiffs were not entitled to a reversal of the judgment dismissing the petition, and must be deemed equal to an express decision that the petition was sufficient. (Citations.)

That the present appellants were appellees on the former appeal and failed to present to the Court the grounds now urged, does not affect the question. It was as much their interest and duty to present the grounds and reason on which that judgment could be affirmed as it is now to present grounds and reasons upon which the judgment may be reversed; they were as much bound to present then all available grounds for an affirmance as they are to present now all available grounds for a reversal. The question

as to the sufficiency of the petition was presented in the record then and if the ground assumed by counsel be tenable, an affirmance might have been secured and upon the identical ground upon which a reversal is now asked.

The duty of parties in courts of original jurisdiction is thus correctly stated in *Henderson* v. *Henderson*, 3 Hare, 115: 'Where a given matter becomes the subject of litigation and adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies not only to the point upon which the court was required by the parties to form an opinion and pronounce judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time.'

The learned court speak of the parties, both plaintiff and defendant, and add, 'A party can no more split up defenses

than indivisible demands, and present them by piecemeal in successive suits growing out of the same transaction.'

This duty of the parties in presenting their complaint and defense in the courts of original jurisdiction is in appellate courts devolved on counsel, and no reason is perceived which will allow an appellee to omit an available defect in his adversary's case as ground for affirmance, and afterward to urge that same defect as ground for reversing a judgment against him, which could not equally allow an appellant who had on first appeal overlooked some fatal error to prosecute a second appeal. This would render litigation in appellate courts practically interminable.

Reason and authority alike demand that if on a first appeal there is a question in the record which, if decided in favor of the appellee, would entitle him to an affirmance of the judgment in his favor, it is his duty to present it to the court, when it will become the duty of the court to decide it, and if the appellee fails to present the question, or the court fails to decide it, and reverses the judgment, on a subsequent appeal, that question must be treated as having been decided adversely to the appellee in the first case, whether he be the appellant or the appellee on the subsequent appeal."

See, also, *Henderson* v. *Henderson*, 3 Hare, 100, 115, and note 1, pp. 114-15 of Smith's Ann. Ed. of 3, Hare's reports.

In *Breadalbane* v. *Chandos* 2 M. & C., 711, Lord Cottenham said (p. 732):

> "It is certainly contrary to the practice in this court to assume jurisdiction in favor of parties who, having had an opportunity of asserting their title in another court, where the matter had been the subject of adjudication, have either missed that opportunity or have not thought proper to bring their title forward."

Upon these authorities, we respectfully contend that the sufficiency of the defendant's plea or answer herein was settled by the first decision of the N. M. Supreme Court, and is not now open for consideration upon this review of the second judgment rendered by said territorial supreme court.

(3) *The defendant's plea or answer herein sufficient at common law.*

We submit that, irrespective of the operation and effect of the New Mexico Act above quoted, the plea or answer of the defendant herein was at common law appropriate, regular and sufficient to entitle defendant to raise all the issues and introduce all the evidence which were presented by it in the case at bar.

In *2 Greenleaf on Evidence* (16th ed.), 96, we find the following:

> "§ 648. The defense to this action (trover) in the United States, when it

> does not consist of matters of law, is almost universally made under a plea of 'not guilty'; a special plea in trover being as seldom seen here as it was in England under the old rules of practice. * * * In this country, as formerly in England, this plea put the whole declaration in issue. Under it, therefore, the defendant may prove by any competent evidence, * * facts showing a license, etc. It has been said that release is the only special plea in trover, etc."

In *Nichols* v. *Minn. &c. Mfg Co.*, 70 Minn., 528, the answer was a *general denial*, and the Court *held*:

> "In an action of trover the plaintiff alleged generally that the defendant had converted the property to his own use without stating in what way he converted it. *Held*, under a general denial in the answer the defendant may prove any state of facts which show that he has not converted it."

And at page 530 the Court said:

> "It is assigned as error that the court permitted the defendant to prove a certain South Dakota statute against the objection that it was not pleaded in the answer, which statute, as the courts of that state have construed it, provides that a chattel mortgage shall not pass the title to the property covered by it until foreclosure, but that it shall confer on the mortgagee

merely a lien as security for the payment of the indebtedness. We are of opinion that the evidence was competent, if material. The plaintiff did not allege the manner in which the defendant converted the property, and under its complaint might have proved that the defendant converted it any one of several different ways. * * * The defendant was not obliged to anticipate the proof in the answer, but had a right to meet it with any evidence which showed that it was not guilty of converting the mortgaged property. (Citations)."

In *Johnson* v. *Williams*, 48 Vermont, 565, the defendant pleaded the general issue, and the case turned upon certain proceedings before a justice's court which, it was contended, could not be admitted in evidence because not specially pleaded. The Court said (p. 570):

"The action is trover. The *conversion* of the property by the defendant is the *gist* of the action. The plea of not guilty put in issue the conversion and the lawfulness of it. Under this plea alone, probably, but certainly in connection with the notice, the defendant would have a right to show that he had not converted the plaintiff's property to his own use, but that what he had done about the same, he had done under a legal process and lawfully. The legal effect of the record of the proceedings be-

fore the justice court, admitted under the general issue and notice, is, to show that the defendant had not unlawfully converted the plaintiff's property to his own use, etc."

In *Wallace* v. *Robb*, 37 Iowa, 192, it was held:

"Where in an action for trespass for taking personal property, the defendant answers denying the taking and the allegations of the petition generally, he may thereunder produce evidence showing that the property was taken by him with the assent of the plaintiff."

And the Court said (p. 194):

"In the first place plaintiff's counsel insists that the only issue in the case was the taking and holding the possession of the property by defendants; that defendants deny they took the property and they will not, therefore, be permitted to show a justification for taking.

The defendants deny generally the allegations of the petition, and then set up a state of facts which amounts to a defense to the action. The purport of the special defense is that defendants did not take possession of the property. Now, the petition claims to recover on the ground that defendants wrongfully seized the property and retained possession thereof. If defendants showed that they took and held the property under an agreement

> with, and by the consent of plaintiff, it was certainly a defense *proper to be introduced under defendants' general denial*, for it would establish that defendants did not wrongfully take and hold the property, and this is the very burden of the issue."

Upon the strength of these authorities and many others similar, which might be cited, we confidently contend that defendant's answer herein was at common law sufficient to make admissible all the evidence to which plaintiff objected at the trial.

III.

Burden of Proof.

Another contention, urged by the eminent counsel for plaintiff in error upon the New Mexico Supreme Court on the second review in this case, was that the burden was upon the defendant in error to establish affirmatively that it had not been guilty of any "wrongful conversion" of the timber which is the subject of this action. His contention was that, even conceding that the Act of Congress granted to the railroad company the right to take timber from the public lands for the purposes specified in the said Act, and conceding further that this timber was taken from the public lands by The New Mexico Lumber Company upon written authority from the defendant in error which expressly limited the lumber company to taking timber for the purposes expressly permitted by said statute, the defendant must nevertheless

go further and establish clearly and affirmatively that it made *no wrongful misuse* or misapplication of the timber which it had a right to take for the specified purposes,and which was actually taken for those purposes.

Passing over for the present certain radical and, as we believe, fatal insufficiencies in the proof introduced on behalf of the plaintiff below, and the entire sufficiency of the defense affirmatively established by the defendant below, we respectfully, but most confidently, submit that the rule of law as to the burden of proof is not as was contended by counsel for the plaintiff in error in the New Mexico Supreme Court, but, on the contrary, that the burden was on the plaintiff below to establish affirmatively *a wrongful conversion* by the defendant.

The declaration herein is in the most general terms, not even charging any wrongdoing in intent or act; and under it the plaintiff below was by statute permitted to introduce any proof which would tend to establish an unlawful conversion of this lumber. The declaration, although it does not say so, yet must in law be interpreted as charging a *wrongful* conversion of this property, and the N. M. Court upon the former review correctly decided that "the sole issue presented is, has a wrongful conversion been committed? *D. & R. G. v. U. S.*, 9 N. M., 382, 386.

The burden of proving this was on the United States, and in order to sustain that burden it must prove that the defendant in error entered upon these public lands without authority, or that having entered thereon with due authority, it exceeded

the limits of its authority in taking timber, or that having taken it for the specified purpose, it was illegally misused or misapplied to some other purpose not authorized by the statute.

Until a plaintiff has, by some legally sufficient evidence, affirmatively attached the element of wrongfulness to the alleged act of a defendant, the latter is protected by the invariable presumption of law that assumes, until the contrary is affirmatively shown, that a party has acted with entire rectitude and within his legal rights.

That the burden of proof in actions of trover is as we have stated above, can, if questioned, be demonstrated by reference to old English cases of the period when or soon after that form of action first came into general use.

In *Cooper* v. *Chitty*, 1 Burrows, 20, 31, Lord Mansfield said, after stating the case:

> "It is an action of trover. * * * In *form* it is a fiction, in *substance*, a remedy to recover the value of personal chattels *wrongfully* converted by another to his own use. The form supposes the defendant *may* have come lawfully in possession of the goods. * * *
>
> This is an action of tort, and the whole tort consists in the *wrongful conversion*.
>
> Two things are necessary to be proven to entitle plaintiff to recover in this kind of action: 1st, Property in the plaintiff; 2dly, A wrongful *conversion* by the defendant."

[Note the very suggestive italics in the above quotation, which are not ours, but those used in the decision itself.]

In *Keyworth* v. *Hill*, 3 B. & A., 6, 687, it is said:

> "The action is founded on the *wrongful act* of the defendant."

In *Burroughs* v. *Bayne*, 5 Hurls. & N., 296, Martin, B., said (302), and the other members of the court agreed with him:

> "I, myself, have always understood that trover was the action whereby the person *entitled to the possession* of goods *wrongfully* detained from him was entitled by law to recover for their detention. I do not think that there is any necessity to discuss the original meaning of the words 'trover' or 'conversion'; they are technical expressions used in an action given by the law to enable a man to recover damages for the *unlawful* detention of his property. I freely admit that the word 'conversion' is an unfortunate expression. * * * In ordinary cases the plaintiff's proof is much the same as would be required in an actio n of detinue.

In *Pillott* v. *Wilkinson*, 2 Hurls. & C., 72, the same court said (82-3):

> "The term 'conversion' has, in truth, a technical and conventional meaning, which was originally given to it in order, etc.

* * * * By long practice it has been established that where a person withholds from another his goods *without lawful reason or excuse*, the action of trover lies."

Blackstone, in his comment upon the action of trover, says:

"A conversion must be fully proved."

In *1 Greenleaf on Evidence* (16th ed.), 148, the general rule is stated as follows:

"§ 74. *In general.* The third rule which governs in the production of evidence is, that the obligation of proving any fact lies upon the party who substantially asserts the affirmative of the issue.

(p. 152) "§ 78. *Sundry instances.* To this general rule, that the burden of proof is on the party holding the affirmative, there are some exceptions, in which the proposition, though negative in its terms, must be proved by the party who states it. One class of these exceptions will be found to include those cases in which the plaintiff grounds his right of action upon a negative allegation, and where, of course, the establishment of this negative is an essential element in his case; as for example, etc."

(p. 154) "§ 80. *Sundry instances.* Where the negative allegation involves, * * * the wrongful violation of actual lawful

possession of property; *the party making the allegation* must prove it; for in these cases the presumption of law, which is always in favor of innocence and quiet possession, is in favor of the party charged."

In *6 Wait's Actions and Defenses* (1879), we find the following:

(p. 44) "§ 2. Acts done under authority of law are not trespass."

(p. 70) "§ 8. It is a rule that if one enters another's premises by authority of law and commits an unjustifiable act, he will be deemed a trespasser *ab initio*, but if the entry be *by authority of the owner*, the wrong-doer can only be punished for the abuse.

"§ 9. When personal property is on another's lands with his permission and in pursuance of a contract, he cannot lawfully prevent the owner of the property from removing it. If, therefore, standing timber is sold and left on the land by the purchaser after being cut, or any personal property bought and left thereon, the buyer has a right to go upon the land and take it away."

(p. 129) "§ 1. Trover is a special action on the case in favor of any person who has a general or special property in goods, against any person who *wrongfully* withholds them from his possession."

(p. 129) "§ 2. Trover is a proper remedy whenever a person has goods or property in his possession belonging to another, which he *wrongfully* detains from such owners' possession, or from the possession of a person who is entitled thereto. (Citations.) A *wrongful* conversion is *the gist* of the action; and whenever that can be established and the plaintiff maintains his right to the immediate possession of the property, the action will lie."

(p. 142) "§ 5. No person is chargeable in trover for property in his possession belonging to another, unless he holds it *wrongfully*, and against the right of the owner. In order to maintain this action *the plaintiff must show* that the defendant not only has the property in his possession, but, also, that he has *wrongfully* converted it. Therefore it follows that, whenever a person has a justifiable cause for withholding the property, the action will not lie."

(p. 163) "§ 1. In order to maintain an action of trover, *the plaintiff must show* that the defendant has converted the property, otherwise there can be no recovery. Indeed, conversion *of a wrongful character* is the gist of the action."

(p. 221) "Sec. 8. If the plaintiff relies upon his property in the goods converted, the burden is upon him to show property in himself. * * He is also bound to

prove that the property sued for has some value, and what that value is; also that the defendant took or detained the property *without right*, etc. * * * If the defendant has color of title, the plaintiff must show title as well as possession."

In *Burnham* v. *Noyes*, 125 Mass., 85, it was held:

"On the issue whether the conversion of personal property was fraudulent so that an action therefor would not be barred by a discharge in bankruptcy of the defendant, the burden of proving the fraud is on the plaintiff throughout the case; and an instruction that, if the defendant did any acts in relation to the property which were unlawful, the burden was on him to prove that he acted honestly, is erroneous."

In *Rast* v. *Dillon*, 27 S. W., 497, it was held:

"Where in an action for the conversion of a note, the plaintiff alleges that after the note was given to defendant to secure him as an endorser on another note, plaintiff purchased the note, and defendant promised to deliver it to him when the other note was paid, the payment of the other note is a condition precedent to the right of plaintiff to recover, and the burden of proving the same is on him."

In *Waring* v. *Penn. R. Co.*, 76 Pa. St., 491, 496, it is said:

"Lord Mansfield defines the action of trover to be 'a remedy to recover the value

of personal chattels wrongfully converted by another to his own use.' The taking may have been lawful, hence the gist of the action lies in the wrongful conversion. Where one has the lawful possession of the goods of another, and has not converted them, this action will not lie until there has been a refusal to deliver them upon demand made. Ordinarily where such goods have been converted by the bailee, the law presumes it to be wrongful, and the action may be brought without a previous demand; but such presumption may be rebutted, showing a permission from the plaintiff to convert the property."

In this case it may be noted that the defendant pleaded "not guilty," simply.

In *1 Chitty on Pleadings* (16th Am. Edition), the author says:

(p. 165) "The form supposes that the defendant might have come lawfully by it (the property), and if he did not, yet by bringing this action the plaintiff waives the trespass. No damages are recoverable for the act of taking; all must be for the act of converting. This is the tort or *maleficium*, and to entitle the plaintiff to recover, two things are necessary: 1st, property in the plaintiff; 2dly, a *wrongful* conversion by the defendant."

(p. 172). "With respect to the *nature of the injury*, we have already seen that a con-

version is essential to support this action.

It may not be altogether foreign to our present inquiry to give some general account of the different instances of conversion. They may be either, 1st, by *wrongfully* taking a personal chattel; 2dly, by some other *illegal* assumption of ownership, or by *illegally* using or misusing goods; or, 3dly, by a *wrongful* detention."

In *I Addison on Torts* (Wood's ed., 1878), it is said:

(p. 554) "§ 532. To enable a plaintiff to maintain an action and recover damages for a seizure or conversion of chattels, he must show *that the seizure was wrongful*, and that he has been damnified by it. He must, therefore, give some general evidence of his right to the chattel, *and of the wrong* done to him by the defendant in taking it away."

(p. 556). "§ 535. It is *necessary for the plaintiff*, in an action for the conversion of chattels, *to prove* either that the defendant *unlawfully* meddled with the plaintiff's goods, and removed them from some place where they had been deposited by the plaintiff, and that the goods had since been lost to the plaintiff, or that the chattels came to the hands of the defendant wrongfully, or by a tortious taking, or that the defendant has *unlawfully* exercised dominion over

them, to the prejudice of the plaintiff, or that there had been a wrongful destruction of the chattels."

The amount of affirmative evidence which the plaintiff must introduce to make out a *prima facie* case of "wrongful conversions" may differ in different cases; but in *all* cases he must establish the *wrongfulness* of the conversion, before he is entitled to recover or to put the defendant upon proof. Sometimes the circumstances of a particular case may be such that very slight proof on the part of the plaintiff may be sufficient, and there are even instances in which the mere proof of the taking or the detention necessarily discloses *such a condition of facts* as is sufficient to outweigh the presumption of innocence and lawfulness and to make out a *prima facie* case of wrongful conversion; but even in such cases the burden of proof is shifted to the defendant, not because the plaintiff is relieved of showing the wrongfulness of the alleged conversion, but because the evidence, which the plaintiff has produced to show the taking or the detention of the property, is of such a character that it is at the same time evidence, either direct or by legitimate inference, of the further fact that the taking or the detention was "wrongful."

We think, therefore, that we are justified in saying that we believe that there is no well considered case which, when thus analyzed, legitimately supports the contention that when the plaintiff merely shows that the defendant has property which was once plaintiff's, the latter has with-

out further proof of the wrongfulness of the defendant's possession made out a *prima facie* case sufficient to put the defendant upon his defense.

Moreover, the learned counsel confused the burden of proof as to the existence or *acquisition of a right*, with the burden of proof as to the lawful and proper *exercise of that right*. Some authorities do hold in cases which have arisen under somewhat similar statutes that the burden of establishing a special or unusual grant, right, license or privilege is upon the party asserting such right, license or privilege. But the authorities with equal unanimity hold, either directly or by logical and necessary implication, that *when the right or license is established* by the evidence, then the presumption of law is that the right has been *properly and legitimately exercised*, and that the burden of proof is on the party asserting the contrary.

A single instance of what we mean will be sufficient.

In *U. S.* v. *Reder*, 69 Fed., 965, the grant or license from the government to cut timber on the public lands having been established the Court says that the burden was on the United States

> "to satisfy the jury by the evidence beyond a reasonable doubt that the defendant did *cut timber* * * * from the public land of the United States *for purposes other than those 'contemplated by the statute'*."

So, also, we say in this case, that the law is properly laid down by N. M. Courts in the case at bar, that when the railroad company had *established*

its right, under a solemn grant from the government, to cut timber upon the public lands, then the burden is on the plaintiff in error to establish that the railroad company *exercised a legal right in an unlawful manner*. After repeated, careful and an extensive examination of the authorities, we have found but a single case which fairly and clearly announces the opposite docrine, to wit: *U. S.* v. *D. & R. G.*, 31 Fed., 889. But the decision of Judge Hallett in that case, so far as regards that part of it, was disapproved and reversed by the Circuit Court in *D. & R. G.* v. *U. S.*, 34 Fed., 838, which latter decision was affirmed by the Supreme Court of the United States in *Same* v. *Same*, 150 U. S., 1.

The defendant below established by the evidence that it was the grantee and beneficiary of the Acts of Congress approved June 8, 1872, and March 1, 1877. It further established that within the time fixed for those Acts it had constructed 1130 miles of its railway lines, as to which it was entitled to the benefit of the rights and privileges granted by said Acts. It further established that the lands described in the declaration were adjacent to its said railway lines within an extreme limit of three miles from said lines; also that the timber received by it was taken and received for railroad purposes.

(See agreed statement of facts, Rec., fol. 32-4, and defendant's exhibits "A", "B", "C" and "D").

When analyzed and reduced to its ultimate effect the contention by the plaintiff in error in this case upon the subject of the burden of proof is that, even if it be conceded that the railroad com-

pany had a *right*, under the Acts of Congress aforesaid, to take and use this property for the purposes specified in the Congressional grant, and even if it be further conceded that the railroad company actually did take and receive such material *for the purposes contemplated* by the statute, the burden of proof was nevertheless upon the defendant to go still further and show exactly *how and where* it used each piece of this timber, in order to establish clearly and affirmatively that it had not "misused or misapplied" any of it to some purpose not contemplated by the Act of Congress.

We confidently submit that such is not the law. *The right* of the railroad company to take timber being clearly established, and the fact being further shown that it took the timber for *the purposes mentioned in the statute*, and did not confer upon The New Mexico Lumber Company any right to take timber from the public lands for any other purpose, the presumption arises that the railroad company properly and rightfully *used* the timber, which it rightfully received, and if the plaintiff below relied upon the fact that the defendant below had been guilty of conversion by reason of a misuse of this timber, the burden was upon the plaintiff to show that fact.

IV.

Adjacency.

Another point that was raised by the plaintiff in error upon its assignment of errors in the New Mexico Supreme Court (Rec., fol. 41, Assignment 13th), was that the lands described in the declara-

tion were not adjacent to the line of the defendant's railroad constructed prior to June 8, 1882. The record herein shows (fol. 33):

> "3. That the railroad lines constructed prior to June 8, 1882, extended through a portion of the lands described in the plaintiff's declaration in this cause and for a distance of more than one hundred miles west and four hundred miles east and north of said lands."

And also (fol. 34):

> "6. That all of said 2,100,000 feet of lumber so received by the defendant railroad company was cut from trees standing within a maximum distance of three miles from the main line of the defendant railroad company; that about one-third of the whole amount was cut within one mile of said railroad line, one-third at a distance of more than one mile, but not exceeding two miles, and the remaining one-third at a distance of more than two miles, but not exceeding three miles from said railroad line."

The mere statement of the admitted facts in relation to the situation of these lands relative to the road of the defendant in error constructed under the Act of June 8, 1872—especially when viewed in the light of the decisions to which attention has already been called—is a complete and irrefutable demonstration that said lands were "adjacent" to the defendant's lines within the contem-

plation of said Act of Congress, and that the New Mexico Supreme Court correctly held that the contention of the plaintiff in error to the contrary was untenable.

V.

Issues and Facts Involved in the Case at Bar.

In the foregoing discussion we have covered, we think, all the contentions of law which appear in the assignment of errors made by the plaintiff in error in the Supreme Court of New Mexico, and which, for want of any other or better information upon the subject, we assume will be, or at least may be, urged upon the present writ of error.

Having now sufficiently and, as we believe, fully presented the propositions of law by which this case is to be determined by this Honorable Court, it is material, or certainly seems appropriate, to consider briefly the issues and facts of this particular case to which that law is to be applied.

(1) *The Pleadings on behalf of the plaintiff.*

The pleadings filed by the plaintiff below consist of the declaration (Rec., fol. 5), and a general replication (fol. 9).

A consideration of the declaration discloses two particulars in which it fails to contain allegations which are *ordinarily deemed essential* for a legally sufficient declaration in an action of trover, to wit:

(a) *Wrongful conversion* by the defendant.

This declaration wholly omits to charge, either directly or inferentially, by a statement of facts out

of which wrongful conversion can be legally implied, that the defendant is chargeable with any "wrongfulness" in its alleged action relative to this property. It must, and doubtless will, be contended that the omission of this element from the declaration is excused and rendered unnecessary by the New Mexico Act, above referred to, and with this contention we are not disposed to take issue.

(b) *Property* in the plaintiff.

The first essential, both of pleading and proof, on the part of the plaintiff in an action of trover is that he shall allege and prove "property" in the chattels sued for by showing that he had possession, or an immediate right of possession, of said chattels *at the time of the alleged conversion.* This declaration, however, does not contain such an allegation. It only alleges that the goods, which the defendant is accused of converting to its own use, consisted of "logs, lumber and timber manufactured out of trees theretofore standing or growing upon certain lands of the plaintiff," etc.

An allegation that said trees "*theretofore*,"—that is, at some indefinite time previous to the alleged conversion,—stood upon certain lands of the plaintiff is, we submit, not a sufficient allegation that the plaintiff had, at the time of the alleged conversion of these goods by the defendant, the possession of, or the immediate right of possession of, said property. It is evident from this allegation that the plaintiff based its right upon the fact that said trees were "theretofore"

standing or growing upon certain lands of the plaintiff, but there is no allegation either that the defendant took these trees from said lands while the plaintiff was the owner of the land, or that at the time the trees were taken they were the property of the plaintiff; nor is there anything in the declaration, we think, which *necessarily* amounts to an allegation of such facts.

We submit, therefore, that the application of well-recognized principles of law shows that this declaration does not sufficiently allege *plaintiff's title* to these trees at the time that the lumber manufactured therefrom is said to have been converted by the defendant. We think that the defendant in error might, if it chose to do so, safely rely on the fact that the declaration herein does not state a cause of action against it, and was therefore wholly insufficient to support any judgment in favor of plaintiff in error.

(2) *Plaintiff's Evidence.*

By reference to the agreed statement of facts, (Rec., fol. 30), it is apparent that the plaintiff below at the trial established only three material facts, to wit: (a) That the lumber which the railroad company received was cut from the lands described in the declaration; (b), that *prior* to the time of said cutting said lands were public lands of the United States; and (c), the value of said timber.

Upon applying to this evidence the principles of law laid down by Lord Mansfield in *Cooper* v. *Chitty*, *supra*, and, as we contend, obtaining ever

since, it will be seen that it fails to establish either of the fundamental facts which are essential to make out a case in favor of the plaintiff, to wit: (1) *property* in the plaintiff *at the time of the alleged conversion*; and (2) *wrongful conversion* by the defendant.

On the one hand, there is no attempt in this evidence to establish affirmatively, either by direct evidence, or by necessary or legal inference from the evidence introduced, that the railroad company *wrongfully* received or used this timber.

On the other hand, this evidence is insufficient to show *title* in the plaintiff *at the time of the alleged conversion.* The mere fact that at some indefinite time, "*prior* to the time of said cutting, said lands were public lands of the United States," is not sufficient evidence that the United States was the owner of these lands at the time the trees were cut or at the time the railroad company received this lumber, or that the plaintiff then had a *present* right to the possession of either the lumber or the lands.

We therefore think that if the railroad company had, when plaintiff rested its case, (Rec., p. 9), interposed a motion for a nonsuit, or a demurrer to the evidence, the trial court would have been required by law to sustain the same and to hold that the plaintiff had not made out a case.

(3) *Defendant's evidence.*

The defendant, however, did not choose to rest upon its technical rights arising out of the aforesaid insufficiencies of the plaintiff's pleadings and proof, but, secure in the consciousness that it had acted strictly in accordance with the rights

solemnly granted to it by Congress for the valuable consideration of the benefits which the construction and operation of its road had conferred and was conferring upon the country and its people, it preferred to put in its defense upon the merits. It introduced in evidence, (1) the Acts of Congress aforesaid, showing its *right* to take timber from these public lands, if they were public lands at that time; (2) its appointment of The New Mexico Lumber Company; and (3) its orders upon that company for lumber, showing that in its dealings with such lumber company it had only authorized and had expressly limited said company to taking timber from the public lands in the localities and for the purposes *specified in said acts.* It further showed the extent of its road constructed under said Act of Congress, to wit: 1130 miles; and the further fact that this portion of its road extended through the lands in question, and for from 100 to 400 miles beyond on either side thereof. It further showed the maximum distance from the line of its road of any and all of the lands from which timber was taken, to wit, within a three mile limit.

The evidence thus produced by the defendant, we submit, was ample to establish a perfect defense to this action, even if it could be held that plaintiff had made out a *prima facie* case, and that the burden of proof was shifted to the defendant to establish its right from the government to take timber and that it had taken timber only in accordance with the terms of the grant. Hence the trial court could not do otherwise than give judg-

ment in favor of the defendant and the territorial Supreme Court was, by the law and the facts, bound to affirm that judgment.

It should be borne in mind that, while the congressional grant here under consideration is a special statute, it is a *public*, rather than a private grant. A railroad company is a *quasi* public corporation. While the ultimate ownership of the tangible property of the railroad company is in private parties or persons, the railroad company exists and operates entirely in the interests of the public; and but for the essential benefit and public utility which the community at large receives therefrom railroads would not be permitted to exist. Therefore, this grant can not be said to be a private grant to a private individual for his sole benefit, but it is, though special, *a public grant*, and, as will be seen by the Federal cases already repeatedly referred to, the courts in interpreting and giving effect to this statute are governed more nearly by the rules of construction applicable to general statutes rather than those by which special private grants or licenses are given. Accordingly we find the courts always holding that while they are authorized to, and usually do, exercise a greater or less amount, according to the particular case, of strictness in construing such statutes for the purpose of ascertaining *the right* which Congress intended to give, yet, when it has been ascertained and determined that Congress intended to grant a right and a substantial benefit and that the party comes within the class to which the right or benefit is intended to be given, then such statute must

receive *a liberal construction* for the purpose of *carrying into effect the beneficent intention* of Congress. The rule in this respect is aptly and fully stated in the *Bacheldor* case, *supra*, and is also expressly mentioned with more or less prominence in many others of the Federal cases above referred to.

VI.

Rulings Upon Evidence and Instructions.

The assignment of errors in the New Mexico Supreme Court included assignments predicated upon the admission of evidence on behalf of the defendant and the giving and refusal of instructions, but, as these assignments were not seriously urged in the court below, we presume they will not be seriously urged here, for the propositions of law which have been fully discussed in the preceding portions of this brief show that the rulings of the trial court upon the admission of evidence and upon instructions were entirely correct and that the judgment of affirmance by the New Mexico Supreme Court upholding those rulings and affirming the judgment of the court below, was correct both in law and upon the facts. No good, therefore, seems to be accomplished by extended discussion, at this time, of these rulings separately, and, therefore, we will merely refer to the foregoing discussion in relation to the Acts of Congress aforesaid and to the "burden of proof," as necessarily involving and sufficiently supporting our contention that, so far as concerns these points,

the judgment of the court below was correct and should be affirmed.

We respectfully submit that there was no error in the judgment of the New Mexico Supreme Court to which this writ has been sued out, and that said judgment should be affirmed.

Very respectfully,

EDWARD O. WOLCOTT,
JOEL F. VAILE,
CHARLES W. WATERMAN,
EDWARD L. BARTLETT,
Solicitors for the Defendant in Error.

WILLIAM W. FIELD,
of Counsel.

Supreme Court of the United States.

No. 20.—October Term, 1903.

The United States, Plaintiff in Error, vs. The Denver and Rio Grande Railroad Company. } In error to the Supreme Court of the Territory of New Mexico.

[November 9, 1903.]

This was an action of trover brought by the United States against the railroad company for the value of certain logs cut upon the plaintiffs' lands. The declaration averred simply that the "defendant converted to its own use plaintiff's goods; that is to say, logs, lumber and timbers, . . . manufactured out of trees theretofore standing and growing upon certain lands of the plaintiff," therein described.

The defendant pleaded not guilty, issue was joined, the case tried before a jury, which was instructed to return a verdict for the defendant.

The case was submitted upon an agreed statement of facts, which showed that the New Mexico Lumber Company cut from the lands described in the declaration 2,100,000 feet of lumber, which was furnished to and received by the railroad company for its use.

Upon these facts, and proof of the ownership of the lands, and of the value of the lumber cut, the plaintiff rested.

The defendant also offered an agreed statement of facts, in which it appeared that it was the successor of the Denver and Rio Grande Railway Company, and that by act of Congress of June 8, 1872, (17 Stat. 339,) and amendatory act of March 1, 1877, (19 Stat, 405,) "the right of way over the public domain . . . and the right to take from the public lands adjacent thereto, stone, timber, earth, water, and other material required for the construction and repair of its railway and telegraph line," was granted to the Rio Grande Railway Company, of which the defendant was entitled to the benefit. The amendatory act of 1897 merely extended the time for the completion of the railway from five to ten years, and is not material to this controversy. Defendant also offered testimony showing the appointment of the New Mexico Lumber Company as its agent for the cutting of such timber for the purposes mentioned, and that the lumber delivered to the railroad company was furnished upon specific orders given to the Lumber Company as its agents. There were other facts included in the statement which are immaterial upon this writ of error.

No testimony was offered by either party tending to show whether the timber cut from the lands and received by the defendant was required for the construction and repair of its railway and telegraph line.

The jury, under instructions of the court, returned a verdict of not guilty, and judgment was entered for the defendant, which was affirmed by the Supreme Court. (66 Pac. Rep. 550.)

The case was first tried in 1897, a verdict for plaintiffs returned, the case carried to the Supreme Court, which reversed the judgment of the court below upon the ground of erroneous instructions with respect to the burden of proof. (9 N. Mex. 382.)

Mr. Justice BROWN delivered the opinion of the Court.

As plaintiffs alleged simply a conversion of logs, and defendant pleaded the general issue of not guilty, plaintiffs made a *prima facie* case by proving their ownership of the lands, the cutting and asportation of the timber, its value and its subsequent possession by the defendant. Here they were entitled to rest, and did rest. They were under no obligation to put in the special acts of Congress, nor could defendant compel their introduction by them.

By the laws of New Mexico of 1889 certain forms of pleadings are prescribed, including forms of pleas in actions for wrongs, one of which is that the defendant "is not guilty of the wrong alleged," and another "that he did what is complained of by the defendant's" (mistake for plaintiff's) "leave."

Whether it was competent, under the plea of not guilty, to introduce the special acts of Congress in question we do not find it necessary to decide, but assuming that the defense could be made, it is clear that upon the introduction of the statute of 1872 it became necessary for the defendant to assume the burden of producing evidence tending to show that the public lands were adjacent to the right of way, and that the timbers cut were required for the construction or repair of its railway or telegraph line. This is not a question of pleading, but of the order of proof. There was a question of adjacency made in the court below which is not pressed here, and the case was argued substantially upon the question as to which party had the burden of showing the purpose for which the timber was cut.

Except in a single particular, hereinafter noticed, we think this case is practically controlled, with respect to the burden of proof, by that of the *Northern Pacific R. R. Co.* v. *Lewis*, (162 U. S. 366,) decided in 1896. That was an action against the railroad company for negligence in burning certain cordwood belonging to the plaintiffs. To prove ownership, plaintiffs showed that they had entered upon a portion of the unsurveyed lands of the United States, chopped about 10,000 cords from the timber hereon standing, and that after it was cut it was piled up near the rail-

road. For authority to cut the wood plaintiffs relied upon an act of Congress of June 3, 1878, (20 Stat. 88,) the first section of which authorized *bona fide* residents of the State to fell and remove, for building, agricultural, mining or other domestic purposes, timber growing on the public lands, "said lands being mineral and not subject to entry under the existing laws of the United States, except for mineral entry, . . . subject to such rules and regulations as the Secretary of the Interior may prescribe." Plaintiffs insisted that, in the absence of any evidence to the contrary, the presumption was that when they cut the timber they complied with and came under the conditions provided for in this act, and that the burden rested upon the defendant to show that the conditions mentioned in the act had not been complied with by them. The court held that if plaintiffs had acquired the right, by reason of a compliance with the statute, the facts should have been shown by them; that the presumption was that the cutting was illegal, and that the burden of proof was upon the plaintiffs to show the facts which brought them within the statute of 1878.

In *United States* v. *Cook*, (19 Wall. 591,) which was an action of replevin to recover possession of certain logs cut by Indians upon a reservation, and sold to Cook, it was held that the Indians, having only the right of occupancy, could not cut the timber for the purposes of sale, and that it was incumbent on the purchaser to show that the timber was rightfully severed from the lands.

The only feature distinguishing the case under consideration from that of Lewis is that the timber was cut, not by the defendant corporation, but by the New Mexico Lumber Company acting as its agent, and was subsequently furnished and delivered to the defendant. It is insisted that there is a presumption that the agent, having authority to cut, acted within the scope of his authority, and that this would of itself throw upon the plaintiffs the burden of showing that it had not. Although a presumption of this kind may attach to the acts of public officers, we know of no case holding that a party sued for a conversion by his agent may shield himself under a presumption that the agent acted within the scope of his authority. If the burden of proof would rest upon the defendant to show the cutting of timber for a proper purpose, evidently it could not shift that burden upon the plaintiffs by employing an agent to do the work.

Upon principle, as well as upon authority, a party who has been shown to be *prima facie* guilty of a trespass, and relies upon a license, must exhibit his license and prove that his acts were justified by it. The practical injustice of a different rule is manifest. It would require the plaintiffs not only to establish a negative, that is, that the timber was *not* cut for the purpose of construction and repair, but to establish it by testimony peculiarly within the knowledge of the defendant. As the cutting in this case was done by agents and servants of the defendant, it would impose

upon the plaintiffs a difficult if not an impossible task to require them to show that the timber was not cut for the construction or repair of the railway, though evidence that it was so cut could be readily produced by the defendant. It is a general rule of evidence, noticed by the elementary writers upon that subject, (1 Greenl. Ev. sec. 79,) "that where the subject matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that party." When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative. (*Great Western R. R. Co.* v. *Bacon*, 30 Ill. 347; *King* v. *Turner*, 5 M. & S. 206.) Familiar instances of this are where persons are prosecuted for doing a business, such, for instance, as selling liquor without a license. It might be extremely difficult for the prosecution in this class of cases to show that the defendant had not the license required, whereas the latter may prove it without the slightest difficulty. In such cases the law casts upon the defendant not only the burden of producing his license, but of showing that it was broad enough to authorize the acts complained of. (*Commonwealth* v. *Rafferty*, 133 Mass. 574; *Commonwealth* v. *Towle*, 138 Mass. 490.) As the license (the statute in this case) authorized the timber to be cut only for a specific purpose, and the means of proof, as to the purpose for which the timber was cut, were peculiarly within the knowledge and control of the defendant, we think the burden of producing evidence to that effect devolved upon it.

This burden, however, which was simply to meet the *prima facie* case of the government, must not be confounded with the preponderance of evidence the establishment of which usually rests upon the plaintiff. (*Heineman* v. *Heard*, 62 N. Y. 448; *Willett* v. *Rich*, 142 Mass. 360; *Wilder* v. *Cowles*, 100 Mass. 487; *Central Bridge Company* v. *Butler*, 2 Gray, 130.) If this were a criminal case it would undoubtedly rest on the government upon the whole evidence to satisfy the jury beyond a reasonable doubt that the timber was not cut for the construction or repair of the railway.

While the Supreme Court of New Mexico upon this second writ of error may have considered itself bound by its decision upon the question here involved upon the first writ as the law of the case, we are not ourselves restrained by the same limitation. As its judgment upon the first writ

was merely for a reversal of the court below and for a new trial, such judgment, not being final, could not be made the subject of a writ of error from this court. Upon the present writ, however, we are at liberty to revise the action of the court below in both instances.

There was error in requiring plaintiffs to assume the burden of showing that the timber was not cut for purposes of construction or repair, and the judgment of the Supreme Court is therefore reversed, and the case remanded to that court with instructions to order a new trial.

True copy.

Test:

Clerk Supreme Court, U. S.